5-13-2009

Viking Constr. v. Hayden Lake Irr. Dist. Clerk's Record v. 1 Dckt. 36231

Vol. 1 of 2

IN THE SUPREME COURT
OF THE STATE OF IDAHO

VIKING CONSTRUCTION, INC.,
an Idaho Corporation

Plaintiff/Appellant,

vs.

HAYDEN LAKE IRRIGATION DISTRICT
an Idaho quasi-mincipal corporation

Defendants/Respondents.

TRANSCRIPT ON APPEAL
In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai

ATTORNEY FOR APPELLANT
Scott Rose

ATTORNEY FOR RESPONDENTS
Susan P. Weeks

SUPREME COURT DOCKET #36231

36231

IN THE SUPPREME COURT OF THE STATE OF IDAHO

VIKING CONSTRUCTION, INC., an Idaho Corporation Plaintiff/Appellant, vs HAYDEN LAKE IRRIGATION DISTRICT an Idaho quasi-municipal corporation Defendants/Respondents.	SUPREME COURT NO. 36231

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

HONORABLE JOHN P. LUSTER
District Judge

Scott Rose
300 W Main St., Ste 153
Boise, ID 83702

Attorneys for Appellants

Susan P. Weeks
1626 Lincoln Way
Coeur d'Alene, ID 83814

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX

INDEX

Viking Construction vs. Hayden Lake Irrigation District Kootenai County

Date	Code	User		Judge
12/10/2004	NEWC	DRAPER	New Case Filed	John P. Luster
		DRAPER	Filing: A1 - Civil Complaint, More Than $1000 No Prior Appearance Paid by: Scott Rose Receipt number: 0633868 Dated: 12/10/2004 Amount: $77.00 (Check)	John P. Luster
	SUMI	MCCOY	Summons Issued	John P. Luster
12/23/2004	SUMR	HILDRETH	Summons Returned-Found-Donna Atwood 12-14-04	John P. Luster
1/20/2005		VICTORIN	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Owen/James Receipt number: 0638071 Dated: 01/20/2005 Amount: $47.00 (Check)	John P. Luster
	ANSW	VICTORIN	Answer/Susan Weeks	John P. Luster
1/26/2005	NTSV	MO'REILLY	Notice Of Service Of Plaintiff's Requests For Production Of Documents Promulgated Upon Defendant	John P. Luster
1/28/2005	NTSV	MCCOY	Notice Of Service of Plaintiff's Request for Admissions Promulgated Upon Defendant	John P. Luster
	NTSV	HILDRETH	Notice Of Service of Plaintiff's Interrogatories Promulgated Upon Defendant	John P. Luster
2/9/2005	MOTN	MO'REILLY	Motion For Extension Of Time To Respond To Discovery	John P. Luster
2/11/2005	OBJT	SWIGART	Plaintiff's NO Objection to Defendant's motion for Extension of time to Respond to Discovery	John P. Luster
3/1/2005	NTSV	SWIGART	Notice Of Service	John P. Luster
6/28/2005	HRSC	BOOTH	Hearing Scheduled (Motion 08/11/2005 03:30 PM) to deem request for admissions admitted and motion to compel	John P. Luster
6/30/2005	AFFD	MCCOY	Affidavit of Scott Rose in Support of Motions to Deem Requests for Admissions Admitted, to Compel Responses to Requests for Production and Interrogatories, and for Attorneys Fees and Costs	John P. Luster
	MOTN	MCCOY	Motion to Deem Plaintiff's Requests for Admission Admitted, Motion to Sign Under Oath, and Motion for Attorney's Fees and Costs	John P. Luster
	MNCL	MCCOY	Motion To Compel Answers to Interrogatories and Responses to Requests for Production, Motion for an Order that the Answers and Responses be Signed Under Oath, and Motion for Attorneys Fees and Costs	John P. Luster
	NOHG	MCCOY	Notice Of Hearing	John P. Luster
8/4/2005	MOTN	MO'REILLY	Defendant's Response To Plaintiff's Motion To Compel Responses To Requests For Production and Interrogatorries	John P. Luster

Viking Construction vs. Hayden Lake Irrigation District Kootenai County

Date	Code	User		Judge
8/4/2005	AFFD	MO'REILLY	Affidavit Of Susan Weeks In Responses To Plaintiff's Motion To Compel Responses To Reqests For Production And Interrogatorries	John P. Luster
	MOTN	MO'REILLY	Defendant's Response To Plaintiff's Motion To Deem Requests For Admission Admitted	John P. Luster
8/5/2005	RTSV	HILDRETH	Return Of Service-Found-Susan Weeks Attrny for Defendant 08-05-05	John P. Luster
8/11/2005	INHD	BOOTH	Hearing result for Motion held on 08/11/2005 03:30 PM: Interim Hearing Held to deem request for admissions admitted and motion to compel	John P. Luster
2/7/2006	NOPD	DUBE	Notice Of Proposed Dismissal Issued	John P. Luster
2/21/2006	AFFD	JOKELA	Affidavit of Scott Rose in Support of Retention	John P. Luster
2/27/2006	IOPR	MEYER	Inactivity Order Printed - File Sent to Judge	John P. Luster
3/13/2006	ORDR	JOKELA	Order Regarding Plaintiff's Discovery Motions	John P. Luster
	REVR	JOKELA	Reviewed And Retained	John P. Luster
5/10/2006	SDTA	BROOK	Subpoena Duces Tecum Acceptance of Service Cathy Meyer 10May06	John P. Luster
	NOTC	BROOK	Notice of deposition pursuant to IRCP rule 30(b)(6)of the Hayden Lake Irrigation District	John P. Luster
	NOTC	BROOK	Notice of Deposition of Bert Rohrbach	John P. Luster
	SDTA	BROOK	Subpoena Duces Tecum Acceptance of Service Del Karr 10May06	John P. Luster
	SDTA	BROOK	Subpoena Duces Tecum Acceptance of Service Cathy Meyer 10May06	John P. Luster
5/30/2006	AFSV	HUTCHINSON	Proof of Service and Affidavit On Return Of Service Re: Deposition of Cathy Meyer-Scott Rose-5-30-06	John P. Luster
8/4/2006	MISC	BROOK	Corrospondance from M&M court reporting 05Jun06	John P. Luster
	MISC	BROOK	Corrospondance from M&M court reporting 06Jul06	John P. Luster
10/27/2006	HRSC	BOOTH	Hearing Scheduled (Motion to Compel 12/14/2006 03:30 PM)	John P. Luster
11/28/2006	HRVC	BOOTH	Hearing result for Motion to Compel held on 12/14/2006 03:30 PM: Hearing Vacated	John P. Luster
1/18/2007	NTSV	MCCORD	Notice Of Service to def and def's atty, Susan Weeks, on 1/18/07 via mail	John P. Luster
2/2/2007	NTSV	REMPFER	Notice Of Service	John P. Luster
8/1/2007	NOPD	MEYER	Notice Of Proposed Dismissal Issued	John P. Luster
8/6/2007	AFFD	HUFFMAN	Affidavit of Scott Rose in Support of Retention	John P. Luster
	NOTC	HUFFMAN	Notice of Deposition of Bert Rohrbach	John P. Luster
		HUFFMAN	Notice of Proposed Dismissal	John P. Luster

Viking Construction vs. Hayden Lake Irrigation District Kootenai County

Date	Code	User		Judge
8/17/2007	MISC	HUFFMAN	Supplemental Affidavit of Scott Rose in Support of Retention	John P. Luster
8/21/2007	REVR	RICKARD	Reviewed And Retained	John P. Luster
11/15/2007	MOTN	BOWLES	Motion to Amend Petition	John P. Luster
	AFFD	BOWLES	Affidavit in support of Motion to Amend Petition	John P. Luster
	NOTC	GBROWN	Notice of Change of Address	John P. Luster
12/27/2007	HRSC	BOOTH	Hearing Scheduled (Motion 02/07/2008 03:00 PM)	John P. Luster
12/31/2007	CONT	BOOTH	Hearing result for Motion held on 02/07/2008 03:00 PM: Continued for mediation	John P. Luster
	HRSC	BOOTH	Hearing Scheduled (Motion 02/19/2008 03:00 PM) FOR MEDIATION	John P. Luster
1/2/2008	MOTN	VICTORIN	Motion for and Order to Mediate	John P. Luster
	NOHG	VICTORIN	Notice Of Hearing on Motion	John P. Luster
1/15/2008	NOTR	BAXLEY	Notice Of Transcript Delivery Unsigned for Bert Rohrbach	John P. Luster
1/23/2008	NOTH	MCCORD	Notice Of Hearing	John P. Luster
2/6/2008	AFFD	BAXLEY	Second Affidavit In Support of Motion to Amend Petition	John P. Luster
2/19/2008	INHD	WATKINS	Hearing result for Motion held on 02/19/2008 03:00 PM: Interim Hearing Held FOR MEDIATION	John P. Luster
2/20/2008	HRSC	WATKINS	Hearing Scheduled (Court Trial Scheduled 11/12/2008 09:00 AM) 2 Day	John P. Luster
3/5/2008	ORDR	BOOTH	Order for court mediation	John P. Luster
3/24/2008	ORDR	BOOTH	Order granting leave to amend petition	John P. Luster
3/31/2008	PETN	SHEDLOCK	Amended Petition For Declaratory Relief And Injunctive Relief	John P. Luster
6/2/2008	HRSC	BOOTH	Hearing Scheduled (Motion for Summary Judgment 10/22/2008 03:00 PM)	John P. Luster
	HRSC	BOOTH	Hearing Scheduled (Motion 07/10/2008 03:00 PM)	John P. Luster
6/10/2008	FILE	MCCORD	New File Created **********FILE 2**********	John P. Luster
6/11/2008	MOTN	LSMITH	Motion for An Order to Enlarge Time to Disclose Expert Witnesses	John P. Luster
	AFFD	LSMITH	Affidavit in Support of Motion for An Order to Enlarge Time to Disclose Expert Witnesses	John P. Luster
6/17/2008	ORDR	MCCOY	Order on Plaintiff's Motion for an Order to Enlarge Time to Disclose Expert Witnesses	John P. Luster
6/26/2008	MOTN	VICTORIN	Motion for Relief From Scheduling Order and Notice of Hearing	John P. Luster
6/30/2008	STIP	MCCORD	Stipulation for Motion for Relief	John P. Luster

Viking Construction vs. Hayden Lake Irrigation District Kootenai County

Date	Code	User		Judge
6/30/2008	MOTN	MCCORD	Motion for Relief From Scheduling Order and Notice of Hearing	John P. Luster
7/10/2008	DCHH	BOOTH	Hearing result for Motion held on 07/10/2008 03:00 PM: District Court Hearing Held Court Reporter: Anne MacManus Number of Transcript Pages for this hearing estimated: for relief from PTO - under 100 pages	John P. Luster
		CANTU	Preliminary Expert Witness Disclosure	John P. Luster
8/8/2008	MNSJ	MCCOY	Motion For Summary Judgment	John P. Luster
	NOHG	MCCOY	Notice Of Hearing on Motion for Summary Judgment	John P. Luster
	BRIE	BAXLEY	OPENING Brief In Support Of Motion For Summary Judgment	John P. Luster
	AFFD	BAXLEY	Affidavit Of Scott Rose In Support Of Summary Judgment	John P. Luster
8/22/2008	ORDR	BOOTH	Order (relief from PTO)	John P. Luster
9/8/2008	NTSV	BAXLEY	Notice Of Service	John P. Luster
9/12/2008	FILE	JANUSCH	New File Created***3**********EXPANDO	John P. Luster
10/8/2008	MEMO	ROBINSON	Memorandum In Response To Plaintiff's Motion For Summary Judgment	John P. Luster
10/23/2008	DCHH	BOOTH	Hearing result for Motion for Summary Judgment held on 10/22/2008 03:00 PM: District Court Hearing Held Court Reporter: Terri Rosadovelazquez Number of Transcript Pages for this hearing estimated: X summary judgment motions - over 100 pages	John P. Luster
10/24/2008	HRVC	BOOTH	Hearing result for Court Trial Scheduled held on 11/12/2008 09:00 AM: Hearing Vacated 2 Day	John P. Luster
11/12/2008	MISC	HUFFMAN	Stipulated Motion to Continue Trial	John P. Luster
1/14/2009	DEOP	BOOTH	Memorandum Opinion and Order in re: motion for summary judgment	John P. Luster
1/29/2009	MISC	BOOTH	Summary Judgment	John P. Luster
	DSAT	BOOTH	Dismissal During/after Trial Or Hearing	John P. Luster
	FJDE	BOOTH	Final Judgement, Order Or Decree Entered	John P. Luster
	STAT	BOOTH	Case status changed: Closed	John P. Luster
	CVDI	BOOTH	Civil Disposition entered for: Hayden Lake Irrigation District Kootenai County, Defendant; Viking Construction, Plaintiff. Filing date: 1/29/2009	John P. Luster
	FJDE	BOOTH	Final Judgement, Order Or Decree Entered	John P. Luster
2/12/2009	AFFD	CRUMPACKER	Affidavit of Computation	John P. Luster
2/18/2009	HRSC	BOOTH	Hearing Scheduled (Motion 04/02/2009 03:00 PM) Rule 54B and/or enlargement of time	John P. Luster

Viking Construction vs. Hayden Lake Irrigation District Kootenai County

Date	Code	User		Judge
2/18/2009	STAT	BOOTH	Case status changed: Closed pending clerk action	John P. Luster
	MOTN	ROSENBUSCH	Motion for A Rule 54(B) Certificate, and/or Motion for Enlargement of Time to Motion for Permission to Appeal the Denial of Summary Judgment in this Action for Declaratory Relief	John P. Luster
	NOTH	MCCORD	Notice Of Hearing	John P. Luster
3/3/2009	STIP	LEU	Stipulation Re: Objection To Costs	John P. Luster
	NOTC	LEU	Notice Of Change Of Fax Number	John P. Luster
	MISC	ROSENBUSCH	Amended Certificate of Service/Viking Construction, Inc./03/03/09	John P. Luster
3/4/2009	NOTC	BOOTH	Notice of Change of Fax number to; (208)342-3669.	John P. Luster
	NOTC	HUFFMAN	Notice of Appeal	John P. Luster
3/5/2009	BNDC	RICKARD	Bond Posted - Cash (Receipt 837334 Dated 3/5/2009 for 100.00)	John P. Luster
		RICKARD	Filing: T - Civil Appeals To The Supreme Court ($86.00 for the Supreme Court to be receipted via Misc. Payments. The $15.00 County District Court fee to be inserted here.) Paid by: Rose, Scott (attorney for Viking Construction) Receipt number: 0837335 Dated: 3/5/2009 Amount: $15.00 (E-payment) For: Viking Construction (plaintiff)	John P. Luster
		RICKARD	Miscellaneous Payment: Supreme Court Appeal Fee (Please insert case #) Paid by: Scott Rose Receipt number: 0837336 Dated: 3/5/2009 Amount: $86.00 (E-payment)	John P. Luster
	OBJT	BAXLEY	Objection To Attorney Fees and Costs	John P. Luster
3/17/2009	ANOA	BOOTH	Amended Notice of Appeal - filed by Scott Rose	John P. Luster
3/19/2009	MISC	LEU	Request For Additional Clerk's Record	John P. Luster
3/23/2009	HRVC	BOOTH	Hearing result for Motion held on 04/02/2009 03:00 PM: Hearing Vacated Rule 54B and/or enlargement of time	John P. Luster
3/25/2009	HRSC	BOOTH	Hearing Scheduled (Motion 05/15/2009 08:00 AM) PI's objection to attorney fees and costs	John P. Luster
3/31/2009	NOHG	VICTORIN	Notice Of Hearing	John P. Luster

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702
Idaho State Bar No. 4197

(208) 342-2552 Telephone
scott@idahoiplaw.com
(208) 345-1836 Fax

Idaho State Bar #4197

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: 633868
2004 DEC 10 PM 3:34
CLERK DISTRICT COURT
DEPUTY

SUMMONS ISSUED
DEC 10 2004

Plaintiffs' Attorney

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation,

Plaintiff,

vs.

Hayden Lake Irrigation District, an Idaho quasi-municipal corporation,

Defendants.

CASE NO.: CV04-8889

PETITION FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF

COMES NOW Viking Construction, Inc., an Idaho corporation, Plaintiff, by and through its attorney, Scott Rose, and for cause of action against the Defendant Hayden Lake Irrigation District, an Idaho quasi-municipal corporation hereby petitions, complains, and alleges as follows:

COUNT I

DECLARATORY RELIEF

1. At all relevant times Plaintiff herein, Viking Construction, Inc., an Idaho Corporation in good

002

ASSIGNED TO JUDGE LUSTER

standing (hereinafter referred to as "Viking") residing in the City of Hayden, County of Kootenai, State of Idaho, owned and owns multiple parcels of land within the boundaries of both the Hayden Lake Irrigation District (hereinafter referred to as "Irrigation District") and the City of Hayden (hereinafter referred to as "City"), and as such is a water user with water rights within said Irrigation District and City. Plaintiff's entitlement to water from the Irrigation District is evidenced by the representative invoices from the Irrigation District attached and fully incorporated herein as Exhibits 1, 2, and 3. Said Exhibits are representative invoices of the Irrigation District for the 2005 yearly assessment on lots recently purchased by Plaintiff, other lots in Plaintiff's inventory without construction activity purchased in the last Two to Three (2 -3) years, and lots of Plaintiff with houses under construction. Plaintiff is an interested person as defined by Section 10-1201, *et seq.*, Idaho Code.

2. At all material times alleged herein, Defendant, Hayden Lake Irrigation District, an Idaho quasi-municipal corporation resided in the City of Hayden, County of Kootenai, State of Idaho.

3. Venue is proper in Kootenai County pursuant to and by virtue of Idaho Code Section 5-404.

4. This Court has subject matter jurisdiction in this action and the damages herein are in excess of $10,000; and the monetary amounts in controversy exceed the minimum jurisdictional amounts of the District Court. Viking finds itself in jeopardy and has no relief save from submission of the issue to a court of equity for the determination of (1) whether or not the Charge imposed by the Irrigation District, is permissible or not permissible, (2) whether or not the increase in the amount of the Charge imposed by the Irrigation District, is permissible or not permissible, and (3) whether or not the immediate implementation of the increase in the amount of the Charge imposed by the Irrigation District, is permissible or not permissible. But for the relief set out herein, there is no adequate remedy available to Viking for the deprivation of its Civil Rights.

5. Plaintiff desired and continues to desire to construct new homes on its real property lying within the boundaries of both the City of Hayden and the Hayden Lake Irrigation District.

6. Before the City will accept applications for or issue a building permit, it requires Plaintiff (and similarly situated landowners) to gain an approval signature from the Irrigation District, acknowledging to the City that Plaintiff is entitled to water from the Irrigation District, i.e. the Irrigation District must sign-off on the application form before the City will accept or issue Plaintiff's applications for building permits. Ever since Plaintiff provided Notice pursuant to the Tort Claims Act, on or about November 5, 2004, Defendant altered the time requirement for the payment of the Charges, such that it will now give an approval signature upon request, but will not unlock the water meter until the Charges are paid.

7. Even though Plaintiff as a landowner is entitled to water as evidenced by Exhibits 1, 2, and 3, the Hayden Lake Irrigation District required Plaintiff (and continues to require Plaintiff over its objections) to pay additional money before it signs off on an application for building permit forms of the City. These payments are often fallaciously and spuriously referred to as "hook on fees", "hook up fees", "connect fees", and/or "connection fees" (hereinafter referred to as "Charges"). The nomenclature is misleading: (1) the payments do not pay for any type of physical connection; (2) the payments are neither a fee nor are they regulatory in nature; and (3) the Irrigation District does not have police powers permitting the constraint and regulation of business by means of a fee.

8. Since the City of Hayden will only accept Viking's application for building permits conditioned on receipt of Hayden Lakes Irrigation District's "sign-off" that its Charge is paid, Viking can only get building permits issued from the City of Hayden if Viking pays Hayden Lake Irrigation District's Charge. Viking is therefore forced by the Irrigation District to pay the Charges in order to pull building permits from the City. To date Viking's Charges paid to Hayden Lake Irrigation

District are believed and therefore alleged to be in the amount of Four Hundred Seventy-Five Thousand Nine Hundred Twenty Dollars ($475,920). Presently Viking anticipates applying for more than two hundred (200) building permits in the City over the next couple of years which presently will require payment to the Irrigation District for Charges. The acts of the Irrigation District against Viking places Viking in jeopardy.

9. Plaintiff believes and therefore alleges that the Hayden Lake Irrigation District's requirement for payment of a Charge is without statutory basis. According to Titles 42 and 43 of the Idaho Code, irrigation districts may only raise revenue by issuance of bonds, by yearly assessments, and by special assessments. There is no authority for a Charge. Plaintiff further believes and therefore alleges that the Irrigation District does not have police powers to make regulations or charge fees. It only has the statutory given specific regulation making power, which does not provide for Charges or fees. Even if the Charges were a fee, it is none-the-less unlawful, because a fee must be reasonably related to what is given for the fee. The District provides nothing new in exchange for the Charge.

10. Plaintiff further believes and therefore alleges that the Hayden Lake Irrigation District's requirement for payment of a Charge is an equal protection and due process right violation of the US Constitution and the Constitution of the State of Idaho. Assessment rates and special assessment rates must be applied to all landowners equally. Plaintiff further believes and therefore alleges that the Charge violates Article VII, Sections 4 and 5 of the Idaho Constitution as well, as it is at best a tax which is not uniformly applied.

11. Plaintiff further believes and therefore alleges that the Charge is really nothing but a disguised unconstitutional tax; That even if it was a tax within a constitution it is nonetheless imposed without a statutory basis or enabling legislation; That the Irrigation District does not have

the requisite enabling legislation; That no new duties are required of the Irrigation District as consideration for the Charge; That nothing is received in exchange for the Charge payment; That the Charge is unlawfully applied for revenue generation; and That the Irrigation District has usurped its quasi-public trust by imposing the tax.

12. Plaintiff further believes and therefore alleges that Article VII, Section 6 of the Idaho Constitution does not give the District taxing authority. As well, the Charge does not conform to the statutory scheme set out in the Idaho Revenue Bond Act.

13. Plaintiff further believes and therefore alleges that the Irrigation District imposition of Charges violates Article XV, Sections 4 and 5 of the Idaho Constitution, because it interferes with Viking's water rights and priority. The District holds title to the water rights in trust for the landowners. Under irrigation district law every landowner is to be treated equally. A Charge derogates the constitutional protections in Article XV and the statutory protections of due process in Section 43-404, Idaho Code. The imposition of Charges treats different land owners disparately. The imposition of Charges penalizes Viking directly and singularly, causing irreparable harm.

14. Plaintiff believes and therefore alleges that The Charge further violates the uniformity and proportionality requirements for taxes as set forth in Sections 2 and 5 of Article VII of the Idaho Constitution.

15. Plaintiff believes and therefore alleges the Charge unjustly enriches the Irrigation District; That the Irrigation District unlawfully profiteers against its users by requiring payment of a Charge; That the Irrigation District does not own the facilities, but operates the system under contract with the Bureau of Reclamation which does own the facilities; That the profiteering is a breach and violation of the contract(s) between the Irrigation District and the Bureau of Reclamation of the United States to which Viking is a third-party beneficiary; That the non-proportional application of

Charges to different water users is contrary to the requirements with the Bureau of Reclamation; That the Charge is a disproportionate burden on new homes contrary to the requirements with the Bureau of Reclamation; That the Charges divest Viking of its rights secured by existing contracts with the Bureau of Reclamation and by the reclamation laws; and that the imposition of Charges violates the Commerce Clause.

16. Plaintiff believes and therefore alleges that the Irrigation District's imposition of Charges is Ultra Vires and outside of its Articles and Bylaws.

17. The Charges do not cover actual costs of connecting pipes. The Charges are collected for the Irrigation District at large, and not for each newly constructed house. Plaintiff believes and therefore alleges the exactment of Charges constitutes a conversion. The Irrigation District and City acting together are depriving Viking of property without just compensation while acting under color of State law in contravention of the Takings Clause of the Fifth Amendment made applicable through the Fourteenth Amendment, Article I, Section 10 of the Constitution of the United States, and Article I, Section 14 of the Idaho Constitution, and in violation of 42 U.S.C. 1983.

18. Plaintiff believes and therefore alleges that the conditions and exactions by the Irrigation District are arbitrary, capricious, and unreasonable; and are an abuse of governmental power.

19. Plaintiff believes and therefore further alleges that even if there was constitutional and/or statutory authority, the Charge amount and the manner in which it was developed is unreasonable, arbitrary, and capricious.

20. Pursuant to Section 10-1201, *et seq.*, Plaintiff seeks declaratory relief from the Court to declare the rights and status of Plaintiff, as well as, to declare the whether the Charge is permissible or impermissible under the laws of the State of Idaho and the United States; That the Court should declare the imposition of Charges null and void for the reasons given above and in particular without

limitation because the Charge is at best a tax disguised as a fee; and That the Court Order the imposition of Charges as unconstitutional.

COUNT II

DECLARATORY RELIEF

21. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 20 of this Complaint.

22. At the Hayden Lake Irrigation District regular meeting on September 7, 2004, Defendant, amended and raised its commercial and domestic Charge, implementing the increase beginning immediately the following day, on September 8, 2004. The domestic Charge increased from $2200 per house to $2700 per house. The commercial Charge increased substantially, as well.

23. Prior to the September 7, 2004, regular meeting of Defendant, Viking sold sixty-five (65) houses for delivery after September 8, 2004, at a contract price based on the $2200 Charge; and has exhaustively requested the Hayden Lake Irrigation District provide time before implementation of its Charge increase without avail. The Irrigation District will not sign off on the City's application form unless it receives payment of $2700 per home as a Charge. The City of Hayden will not receive, accept, nor issue Viking's application for building permits on any of the sixty-five (65) houses unless Viking first pays the Charges to Hayden Lake Irrigation District. Viking is suffering irreparable injury.

24. Plaintiff believes and therefore alleges that the Hayden Lake Irrigation District's Charge increase violated procedural and substantive due process protections. In particular the Irrigation District failed to provide proper notice of its proposed Charge increase or the reasonable opportunity to be heard on the proposed increase. Plaintiff believes and therefore alleges that the Irrigation District, prior to implementation of the increase should have at least published the reasons for

adopting the increase, the amount of the increased, and the date on which the increase would become final and effective. Furthermore Plaintiff believes and therefore alleges that the little notification which was given was faulty. The Irrigation District only gave notice of a "Rate Increase" which implied that it had to do with assessments, not Charges, and as such that notice was clearly misleading and not substantively correct. Viking repeatedly requested copies of all notices of public hearings scheduled regarding the proposed Charge increase, and the only written notice provided by the Irrigation District is attached and fully incorporated herein as Exhibit No. 4.

25. Plaintiff further believes and therefore alleges that the immediate implementation of Hayden Lake Irrigation District's Charge increase violated procedural and substantive due process protections; That proper notice of the immediate implementation was not provided; and That there was no reasonable opportunity to be heard about the immediate implementation.

26. Pursuant to Section 10-1201, *et seq.*, in the event the Court finds the imposition of a Charge is permissible, then Plaintiff seeks declaratory relief from the Court to declare the rights and status of Plaintiff, as well as, to declare the whether the increase is permissible or impermissible under the laws of the State of Idaho and the United States; and That the Court Order that the increase in amount of the Charge as unconstitutional.

27. Furthermore, pursuant to Section 10-1201, *et seq.*, in the event the Court finds the imposition of a Charge is permissible and finds that the increase is permissible, then Plaintiff seeks declaratory relief from the Court to declare the rights and status of Plaintiff, as well as, to declare the whether the immediate implementation of the increase is permissible or impermissible under the laws of the State of Idaho and the United States; and That the Court Order that the immediate implementation of the increase in amount of the Charge as unconstitutional.

COUNT III

INJUNCTIVE RELIEF

28. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 27 of this Complaint.

29. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from imposing and collecting future Charges.

30. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest.

COUNT IV

REIMBURSEMENT

31. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 30 of this Complaint.

32. To date Viking paid Charges to Hayden Lake Irrigation District in an amount believed and therefore alleged to be in excess of Four Hundred Seventy-Five Thousand Nine Hundred Twenty Dollars ($475,920).

33. Viking believes and therefore alleges that it should be reimbursed for all the monies it paid to the Irrigation District plus interest.

WHEREFORE, Plaintiffs pray for relief and judgment against Defendants as follows:

1. An order from this Court providing for a speedy hearing on the actions for declaratory judgment, and prays that the matter be advanced on the calendar pursuant to the authority of Rule 57, IRCP;

2. An order declaring the imposition of Charges null and void;

3. An order declaring the increase in the amount of the Charges null and void;

4. An order declaring the immediate implementation of the increase in amount of the Charges null and void;

5. An order enjoining and restraining the Defendant from imposing Charges;

6. An order directing Defendant to reimburse to Plaintiff all Charges paid plus interest thereon;

7. For reasonable attorneys fees and costs incurred in prosecution of this Complaint; and

8. For all such other relief as may be available under the law which the court deems just and equitable under the circumstances.

DATED this 10 day of December, 2004.

SCOTT ROSE

By: _____
Attorney for Plaintiffs

VERIFICATION

I, Wendell Olson, hereby verify that I have read the foregoing Complaint and affirm that it is true and correct to the best of my knowledge.

Viking Construction, Inc.

By: _____
Its President

SUBSCRIBED AND SWORN to before me this 10 day of DECEMBER, 2004.

_____
NOTARY PUBLIC for Idaho
Residing at COEUR D'ALENE, Idaho
My Commission expires: 11-22-2005

MARK JOHNSON NOTARY PUBLIC STATE OF IDAHO

HAYDEN LAKE IRRIGATION DISTRICT

P. O. BOX 162
HAYDEN, ID 83835
PHONE NUMBER: 772-2612
FAX NUMBER: 772-5348

LID INFORMATION REQUEST FORM

Please RUSH

DATE: December 1, 2004

COMPANY: NORTH IDAHO TITLE
PHONE: (208) 765-3333

CALLER: KRISTIN 60-8361BG
FAX: (208) 765-1761

PROPERTY OWNER NAME(S): PRAIRIE FALLS DEVELOPMENT
LOT(S): SEE ATTACHED LEGAL BLOCK:
SUBDIVISION: SUNSHINE MEADOW 3RD & 4TH ADD

NEW PURCHASER: PRAIRIE FALLS DEVELOPMENT

ESTIMATED DATE OF CLOSING: 12-6-04

SERVICE ADDRESS: NO ADDRESS AT THIS TIME
PARCEL NUMBER: SEE ATTACHED TAX ROLL

ACCOUNT NUMBER: _____

WE ARE FURTHER REQUESTING STATUS ON UTILITIES: ☐**CURRENT** ☐ **DELINQUENT**

TOTAL AMOUNT OWING TO BRING UTILITIES CURRENT $_____

TIME PERIOD:

_____

TOTAL PAID: $_____

TIME PERIOD:

_____

INFORMATION PROVIDED BY: _____

2005

55 lots x $53.00 ea = 2915.00
3rd addition

11 lots @ 53.00 ea = 583.00
4th

+ Warranty Deed.

Exhibit 1

HAYDEN LAKE IRRIGATION DISTRICT
(208) 772-2612

LOCATION: AINSWORTH DR, 8198 N

ASSESSED ACRES	ACCOUNT NUMBER
.19	312-4900.0

NOTICE OF ASSESSMENTS LEVIED

IN 2004 (FOR 2005 WATER)

CHARGE	AMOUNT
TRACT FEE	10.00
MAINTENANCE	27.00
FED. GOV. REPAYMENT	6.00
EPA/DEQ	10.00
TOTAL ASSESSMENTS LEVIED - 2004	53.00

VIKING CONST., INC.
2605 W HAYDEN AVE
HAYDEN ID 83835-0000

9/14 STV

013

THIS IS THE ONLY NOTICE YOU WILL RECEIVE. *PLEASE READ TERMS ON BACK.*

LOCATION: AINSWORTH DR, 8198 N
DELINQUENT IF NOT PAID ON OR BEFORE JUNE 20, 2005
2ND INSTALLMENT No. 312-4900.0

2nd	26.50
Pen.	
Int.	
Total	

2nd PAYMENT

MAKE CHECKS PAYABLE TO:
HAYDEN LAKE IRRIGATION DISTRICT
P.O. BOX 162
2160 WEST DAKOTA
HAYDEN, IDAHO 83835-0162

OFFICE HOURS:
Monday thru Friday 8:00-12:00 & 1:00-4:00

DATE PAID_____
CASH_____
CHECK_____

LOCATION: AINSWORTH DR, 8198 N
DELINQUENT IF NOT PAID ON OR BEFORE DEC. 20, 2004
1ST INSTALLMENT No. 312-4900.0

1st	26.50	Total	53.00
Pen.		Pen.	
Int.		Int.	
Total		Total	

FULL PAYMENT

MAKE CHECKS PAYABLE TO:
HAYDEN LAKE IRRIGATION DISTRICT
P.O. BOX 162
2160 WEST DAKOTA
HAYDEN, IDAHO 83835-0162

OFFICE HOURS:
Monday thru Friday 8:00-12:00 & 1:00-4:00

DATE PAID_____
CASH_____
CHECK_____

Ex L-67
2 of 2

FAILURE TO RECEIVE THIS NOTICE DOES NOT RELIEVE YOU OF ITS TERMS.

TERMS

All assessments are due December 20 and are payable without penalty as follows:
1st Due December 20
2nd - Due June 20
and if not then paid, interest will be added there to from January 1

Delinquent payments will be subject to the following penalties and interest:
Penalty - 2% of Assessment Due
Interest - 1% per month on assessment due.

No refund for unused water. No irrigation allotment allowed if delinquent.

014

Exhibit 25

HAYDEN LAKE IRRIGATION DISTRICT
(208) 772-2612

LOCATION: AINSWORTH DR, 8351

ASSESSED ACRES	ACCOUNT NUMBER
.21	313-9000.0

NOTICE OF ASSESSMENTS LEVIED

IN 2004 (FOR 2005 WATER)

CHARGE	AMOUNT
TRACT FEE	10.00
MAINTENANCE	27.00
FED. GOV. REPAYMENT	6.00
EPA/DEQ	10.00
DOMESTIC:	
NO. UNITS 1	185.00
TOTAL ASSESSMENTS LEVIED - 2004	238.00

VIKING CONST., INC
2605 W HAYDEN AVE
HAYDEN ID 83835

1952

015

THIS IS THE ONLY NOTICE YOU WILL RECEIVE. *PLEASE READ TERMS ON BACK.*

LOCATION: AINSWORTH DR, 8351
DELINQUENT IF NOT PAID ON OR BEFORE JUNE 20, 2005
2ND INSTALLMENT No. 313-9000.0

2nd	119.00
Pen.	
Int.	
Total	

2nd PAYMENT

MAKE CHECKS PAYABLE TO:
HAYDEN LAKE IRRIGATION DISTRICT
P.O. BOX 162
2160 WEST DAKOTA
HAYDEN, IDAHO 83835-0162

LOCATION: AINSWORTH DR, 8351
DELINQUENT IF NOT PAID ON OR BEFORE DEC. 20, 2004
1ST INSTALLMENT No. 313-9000.0

1st	119.00	Total	238.00
Pen.		Pen.	
Int.		Int.	
Total		Total	

FULL PAYMENT

MAKE CHECKS PAYABLE TO:
HAYDEN LAKE IRRIGATION DISTRICT
P.O. BOX 162
2160 WEST DAKOTA
HAYDEN, IDAHO 83835-0162

Exhibit 30

FAILURE TO RECEIVE THIS NOTICE DOES NOT RELIEVE YOU OF ITS TERMS.

TERMS

All assessments are due December 20 and are payable without penalty as follows:
1st - Due December 20
2nd - Due June 20
and if not then paid, interest will be added there to from January 1

Delinquent payments will be subject to the following penalties and interest:
Penalty - 2% of Assessment Due
Interest - 1% per month on assessment due.

No refund for unused water. No irrigation allotment allowed if delinquent.

016

Exhibit 36

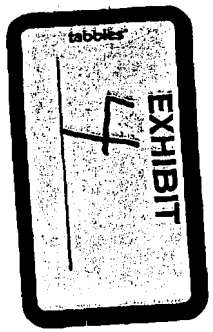
HAYDEN LAKE IRRIGATION DISTRICT

PO BOX 162 ♦ 2160 W. Dakota Ave.
Hayden, Idaho 83835-0162
24 hr (208) 772-2612 ♦ FAX (208) 772-5348
e-mail hlidh2o@hotmail.com
Web page haydenirrigation.com

REGULR MEETING
SEPTEMBER 7, 2004

NOTICE & AGENDA FOR MEETING SEPTEMBER 7TH AT 6: 00PM. WILL SERVE LETTERS FOR THE FOLLOWING SUB-DIVISIONS: BRADFORD ESTATES, SUMMER GLENN, SUNSHINE MEADOWS 4TH ADDITION, STRAWBERRY FIELDS. FINALIZE RICHMOND PROJECT. RATE INCREASES; HYDRANT LOCK-OFF AGREEMENT; REVISIT PART-TIME ADMINISTRATIVE POSITION. BRIAN HOOKER REGARDING ABANDONING A WATERLINE

017



SUSAN P. WEEKS, ISB # 4255
OWENS, JAMES, VERNON & WEEKS, P.A.
1875 N. Lakewood Drive, Suite 200
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
Fax: (208) 664-1684
E-mail: sweeks@ojvw.com

Attorneys for Defendant Hayden Lake Irrigation District

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District an Idaho quasi-municipal corporation. Defendant.	Case No. CV-04-8889 ANSWER CATEGORY : I-1 FEE : $47.00

Defendant Hayden Lake Irrigation District, as and for its answer to the petition filed herein, states and alleges as follows:

1. Defendant denies each and every allegation of the petition, except as herein stated, qualified or admitted.

2. In response to Paragraph 1, Defendant alleges that it is without sufficient knowledge or information to form a belief as to the truth or accuracy of the allegations contained therein and places Viking Construction, Inc. to its strictest proof thereof.

3. In response to Paragraph 2, Defendant admits it is the Hayden Lake Irrigation District, and that it is located in the City of Hayden, Kootenai County, Idaho. Defendant acknowledges that at times courts have held irrigation districts to be quasi-municipal corporations, and affirmatively alleges at times courts have held them to be for-profit corporations. Defendant also affirmatively alleges that certain portions of Idaho Code refer to irrigation districts as "political subdivisions" of the state of Idaho.

4. Defendant admits paragraph 3 of Plaintiff's complaint.

5. Defendant denies the allegations contained in Paragraph 4 of Plaintiff's complaint.

6. In response to Paragraph 5, Defendant alleges that it is without sufficient knowledge or information to form a belief as to the truth or accuracy of the allegations contained therein and places Viking Construction, Inc. to its strictest proof thereof.

7. In response to Paragraph 6, Defendant admits that the City of Hayden requires its signature on building permits. Defendant denies the remaining allegations of Paragraph 6.

8. In response to Paragraph 7, Defendant admits that it charges a water connection fee. Defendant denies the remaining allegations of Paragraph 7.

9. Defendant admits that the City of Hayden will not issue a building permit without Hayden Lake Irrigation District's signature on it. Defendant admits that it will not serve residences within its district without payment of the connection fee. Defendant is without sufficient knowledge or information to form a belief as to the truth or accuracy of the allegations regarding the amount of connection fees paid by Viking Construction, Inc. or the anticipated number of building permits that Viking Construction, Inc. intends to apply for, and therefore denies the same.

10. Defendant denies the allegations of Paragraph 9, 10, 11, 12, 13, 14, 15, 16, 18, 19 and 20 of Plaintiff's complaint.

11. In response to Paragraph 17, Defendant admits that the connection fee is higher than the cost of merely connecting a pipe to another pipe. Defendant denies the remaining allegations of Paragraph 17 and affirmatively alleges that the connection fee is an appropriate equity by-in.

12. In response to Paragraph 21 of Plaintiff's complaint, Defendant hereby incorporates by reference, as so fully set forth herein, all of the answers to the previous paragraphs of this Answer.

13. In response to Paragraph 22, Defendant admits that at a regularly noticed meeting on September 7, 2004, that it raised its domestic connection fee as indicated in Plaintiff's complaint. Defendant denies the remaining allegations of Paragraph 22.

14. In response to Paragraph 23, Defendant is without sufficient knowledge or information to form a belief as to the truth or accuracy of the allegations regarding the number of homes sold by Viking Construction, Inc.. Defendant admits that after the September 7, 2004 public meeting that Viking Construction, Inc. has requested that it reconsider the connection fee for domestic lots. Defendant affirmatively alleges that despite the public nature of its meeting, Plaintiff did not attend or give comment to the Board regarding the setting of connection fees, which item was contained on the agenda. Defendant admits that at the current time, the City of Hayden will not issue a building permit unless it contains the Hayden Lake Irrigation District's signature. Defendant denies that it requires a payment of the connection fee at the time of signature of the building permit and affirmatively alleges that such payment is not required until such time as a connection request is made.

15. Defendant denies the allegations of Paragraph 24, 25, 26, and 27 of Plaintiff's complaint.

16. In response to Paragraph 28, the Defendant hereby incorporates by reference, as so fully set forth herein, all of the allegations contained within the proceeding paragraph of this answer.

17. Defendant denies Paragraph 29 and 30 of Plaintiff's complaint.

18. The Defendant hereby incorporates by reference, as so fully set forth herein, all the allegations contained within the proceeding paragraph of this answer.

19. Defendant is without sufficient knowledge or information to form a belief as to Admit or deny the truth or accuracy of the allegations in Paragraph 32.

20. Defendant denies the allegations of Paragraph 33 of Plaintiff's complaint.

AFFIMATIVE DEFENSES

21. Plaintiff's complaint fails to state claims upon which relief may be granted.

22. Plaintiff's claims are barred in whole or in part due to the equitable doctrines of laches, estoppel, waiver and unclean hands.

23. Plaintiff's claims are barred in whole or in part of the doctrines of recoupment and set-off.

24. Plaintiff failed to mitigate its damages, if any, and said alleged damages should be barred or reduced accordingly.

25. Plaintiff's claims are barred by the statutes of limitation, Idaho Code §§ 5-218 and 5-224.

26. Plaintiff pre-sold residential lots in violation of Idaho Code.

WHEREFORE, Hayden Lake Irrigation District requests the Court:

a. Dismiss Plaintiff's complaint with prejudice;

b. Award Defendant its costs and disbursements, including reasonable attorney fees, to the extent permitted under law; and

c. Award such other and further relief as the Court shall deem to be just and proper.

DATED this 20th day of January, 2005.

OWENS, JAMES, VERNON & WEEKS, P.A.

Susan P. Weeks

By: Susan P. Weeks
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2005 I served true and correct copies of the foregoing document by U.S. Mail upon the following:

Scott Rose, Esq.
300 Main Street, Ste. 153
Boise, ID 83702
Fax: (208) 345-1836

Susan P. Weeks

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2005 AUG -4 PM 4:37

CLERK DISTRICT COURT
DEPUTY

SUSAN P. WEEKS, ISB # 4255
OWENS, JAMES, VERNON & WEEKS, P.A.
1875 N. Lakewood Drive, Suite 200
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
Fax: (208) 664-1684
E-mail: sweeks@ojvw.com
ISB #4255

Attorneys for Defendant Hayden Lake Irrigation District

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District an Idaho quasi-municipal corporation. Defendant.	Case No. CV-04-8889 DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO DEEM REQUESTS FOR ADMISSION ADMITTED

I. PLAINTIFFS MOTION TO DEEM CERTAIN REQUESTS ADMITTED SHOULD BE DENIED

Plaintiff has filed a motion to deem requests for admission admitted, a motion to sign under oath, and a motion for attorney fees and costs. The motion is not based upon Defendant not answering the discovery within the extended time agreed to between the parties, but rather the sufficiency of the answers. Rule 36, I.R.C.P. provides that

> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court

> determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial.

Plaintiff claims that Defendant's answers aren't justified and seeks an order that the matters be deemed admitted.

The Requests for Admission to which Plaintiff complains about the answers do not seek the *application* of law to fact. Rather, they seek admissions of the *interpretation* of law, a matter which this court will determine in the present litigation. Our court has recognized this important distinction in requests for admission. In the case of *Ruge v. Posey*, 114 Idaho 890 (Ct.App. 1988) in commenting in passing on this distinction the court noted:

> Under Rule 36(a), requests for admission are not limited to questions of fact. The rule has been interpreted to permit requests involving opinions, conclusions and mixed questions of law and fact. *See* 8 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2255 (1970). *See also* I.R.C.P. 36(a) (requests may be made about any matters within the scope of Rule 26(b) that relate to statements or opinions of fact or the application of law to fact). Thus, a request to admit one's fault, negligence or liability is permissible. However, **in circumstances where response to a mixed question would be difficult, or would turn primarily on a legal issue to be resolved by the court, an objection to the request may be filed.** No such objection was filed in this case. (Emphasis added.)

The requests for admission which Plaintiff seeks admission (17, 18, 19, 20, 22, 23, 26, 27, 28, 31, 33, 34, 30 (sic), 14, 47, 52, 58, 59, 60, 62 and 63) all represent mixed questions of law and fact aimed at obtaining admissions regarding legal issues to be resolved by this Court. The primary legal issue in this litigation is whether Defendant has the legal ability to charge connection fees for new users of water services. In the complaint, Plaintiff alleged Defendant was without a statutory basis under Titles 42 and 43 of Idaho Code and that the connection fee violated Idaho's constitution or exceeded the legal authority of Defendant. This court will determine these issues as a matter of statutory and constitutional interpretation, and therefore,

Defendant's objections were appropriate. If Defendant had not deemed these matters not to turn primarily on this Court's interpretation of legal and constitutional interpretations, it would have denied the matters, consistent with its answer.

Plaintiff's reason for seeking these denials even though they were previously interposed in the answer is clear from Plaintiff's position regarding the need to support denials with specificity. Plaintiff takes the position in the present motion with respect to other denials of requests for admission that Defendant is under the affirmative duty to provide an explanation of the denial. Thus, Plaintiff seeks to require Defendant's to essentially present a summary judgment argument in its responses to requests for admission. The purpose of discovery is not to determine the other party's legal arguments it will present to the Court in support of its interpretation of the law, but rather to obtain admissible evidence for use at trial (or in summary judgment proceedings).

II. INTERPOSED DENIALS ARE APPROPRIATE

Turning to the issue of specificity, Plaintiff claims that a simple denial of a request for admission does not meet the requirements of rule 36, and that specific reasons must be set forth supporting the denial. No case law is cited to support this proposition. Rule 36 requires that an answer specifically deny the matter **or** set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. Plaintiff wants the Court to read "specifically deny" to read "deny with specificity". The rule clearly sets forth that if one is to deny a response that the answer be an unqualified denial. It does not require that the denial be supported by specific facts as suggested by Plaintiff.

Rule 36 also requires that a denial fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of

which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. This section merely provides that a response must be to the entire request, and if only a portion is denied, then the answering party must qualify what portion is denied and admitted. It does not require that denials contain explanations. Requests for Admissions Nos. 3, 8, 9, 12, 14, 15, 16, 21, 24, 35, 40, 43, 44, 45, 48, 49, 54, 61, 65, 66, 67, 69, 71, and 75 are all unqualified denials and require no qualification.

Regarding Requests for Admissions No. 29, 30(sic), 74, 76 and 78, these answers complied with Rule 36. Good faith required that the answers be qualified and they were.

III. DEFENDANT'S OBJECTIONS THAT SOME REQUESTS WERE VAGUE AND AMBIGUOUS WERE VALID

Plaintiff complains that Defendant's objections aren't valid. Specifically, Plaintiff alleges that Request for Admission No. 10 is not vague. This Request and Response were as follows:

> **REQUEST FOR ADMISSION NO. 10:** Admit you serve numerous residences within the District which have not paid a connection fee in contradiction to your Answer at paragraph no. 9.
>
> **RESPONSE**: Objection. This request is vague and ambiguous as to the definition of the term "numerous". Without waiving said objection, admit that a tap on (connection) fee has been charged to all individuals who were not part of the original Bureau of Reclamation project.

Admission No. 10 incorporates Defendant's Answer, ¶ 9. The incorporated paragraph from the answer read as follows:

> 9. Defendant admits that the City of Hayden will not issue a building permit without Hayden Lake Irrigation District's signature on it. Defendant admits that it will not serve residences within its district without payment of the connection fee. Defendant is without sufficient knowledge or information to form a belief as to the truth or accuracy of the allegations regarding the amount of connection fees paid by Viking Construction, Inc. or the anticipated number of building permits that Viking Construction, Inc. intends to apply for, and therefore denies the same.

The response meets the requirement of Rule 36 of that the answering party meet the substance of

the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested. The request sought an answer as to which members of Hayden Lake Irrigation District paid connection fees and informed Plaintiff that all members except for those properties that were originally included in the Bureau of Reclamation project (and the attendant bond) paid a connection fee. Defendant was not sure what Plaintiff meant by the reference to paragraph 9 of the Answer. Paragraph 9 of the answer indicated that the Defendant would not serve residences without payment of the connection fee. The response qualified the response to make clear which users were charged and which users were not charged a connection fee.

Plaintiff takes exception with the response to Request for Admission No. 13 and Request for Admission No. 11. Plaintiff asked Defendant to admit that it treated "newly constructed residential property regarding connection fees" differently from residences that were constructed before the implementation of a connection fee program." Defendant objected to this request as vague and ambiguous. Plaintiff never clarified the information it sought. However, without waiving the objection, Defendant qualified the answer and admitted a connection fee was charged to all individuals who were not part of the original Bureau of Reclamation project (including the bond funding for the project) and that a connection fee is charged on new construction of residences that are not replacing a previously existing residence. Plaintiff claims the response does not give it information informing it of its policy before and after the District adopted connection fees. Clearly it does. Except for those residences that were encompassed in the original Bureau of Reclamation project and bond, all users subsequently have been charged a connection fee, provided however, if a residence is destroyed and rebuilt and has previously paid a connection fee, it is not again charged a connection fee even though it is "newly constructed".

Plaintiff raises the same concern over the response to Request for Admission No. 17. Besides being objectionable for the reasons previously discussed in Part I of this memorandum, No. 17 is not clear. It requests and admission that Defendant "only has the statutory given specific regulation making power" of Titles 42 and 43. Titles 42 and 43 do not refer to "regulation making powers". Plaintiff is unable in its memorandum to explain to the court what is sought by this admission.

Plaintiff also claims that Requests for Admission Nos. 29, 46, 53, 57 and 76 are not vague ad ambiguous. Again, Plaintiff does not support its allegation with any explanation of what is sought by the requests. Request for Admission No. 29 again refers to "newly constructed residences" and "new duties" without providing any parameters as to what is meant b y these terms. Even though Defendant is left to guess as to what is meant by these terms, it denied No. 29 because the addition of additional users to a water system always increases the duties of the District if "new duties" refer to meter reading, service and billing.

The same issue was raised in Admission No. 46. Plaintiff sought an admission that a connection fee on "new homes" was contrary to the requirements of the Bureau of Reclamation. Defendant defined the term in its answer and then denied the request based upon the definition of the term as it understood it. Plaintiff never indicated that the definition as understood by Defendant was incorrect.

This issue again surfaced at Request for Admission No. 53. Defendant was not sure whether Plaintiff was asking if the agenda was only posted once or if it sought admission that there were no other agenda or notice of the meeting. Defendant answered the question on how many times the actual agenda was posted.

On Request for Admission for Admission No. 57, Plaintiff sought an admission that "the

collected connection fees are meant to be spent on capital improvements." The language is subject to several interpretations. Plaintiff could be asking Defendant to admit the statutory and case law required that the connection fees be spent on capital improvements. Plaintiff could be asking if the Defendant to admit it had a policy that the connection fees be spent on capital improvements. Plaintiff could be asking how the collected fees had been spent in the past. Defendant could not tell, so Defendant complied with Rule 26 and qualified its answer to meet what it believed was the substance of Plaintiff's inquiry.

Finally, on Request for Admission No. 76, Plaintiff wishes the district to admit that agricultural use is greater than residential use of water per acre per year. Plaintiff did not specify a time period. Defendant objected because the mix between agricultural users and residential users has shifted throughout the history of the District. Defendant denied this request with respect to the current year because currently residential use is greater than agricultural use.

IV. RESPONSES UNDER OATH

Plaintiff is correct that Defendant did not verification to the answers. This omission is being corrected.

V. ATTORNEY FEES

Plaintiff is not entitled to attorney fees on this motion as Defendant answered discovery as required by the rules and did not interpose frivolous objections.

DATED this 4th day of August, 2005.

OWENS, JAMES, VERNON & WEEKS, PA

By: Susan P. Weeks

Susan P. Weeks
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August, 2005 I served true and correct copies of the foregoing document by facsimile upon the following:

Scott Rose, Esq.
300 Main Street, Ste. 153
Boise, ID 83702
Fax: (208) 345-1836

Susan O. Harbo

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702
(208) 342-2552 Telephone
(208) 342-3669 Fax
scott@idahoiplaw.com
Idaho State Bar #4197

Plaintiffs' Attorney

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District, an Idaho quasi-municipal corporation, Defendants.	CASE NO.: CV 04-8889 ORDER GRANTING LEAVE TO AMEND PETITION

Plaintiff's Motion for Leave to Amend the Petition having come before the Court on February 19, 2008; that Defendant stipulated to Plaintiff's motion; and with good cause appearing,

IT IS HEREBY ORDERED AND THIS DOES ORDER Plaintiff's Motion for Leave to Amend Petition is granted.

DATED this 21st day of ~~February~~ March, 2008.

By: _____
Hon. John Patrick Luster

CLERK'S CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 24 day of ~~February~~ March, 2008, a true and correct copy of the foregoing Order was mailed to Defendant and Plaintiff, by ~~placing said pleading in the U.S. Regular Mail postage prepaid addressed~~ Fax to:

Susan Patricia Weeks
Attorney at Law
James, Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814
Fax 664-1684

Scott Rose
Attorney at Law
300 West Main Street, Suite 153
Boise, Idaho, 83702
208-342-3469

Clerk

STATE OF IDAHO)
COUNTY OF KOOTENAI) ss
FILED:

2008 MAR 31 PM 12: 58

CLERK DISTRICT COURT

DEPUTY

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702
Idaho State Bar No. 4197

(208) 342-2552 Telephone
scott@idahoiplaw.com
(208) 342-3669 Fax

Idaho State Bar #4197

Plaintiffs' Attorney

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District, an Idaho quasi-municipal corporation, Defendants.	CASE NO.: CV 04-8889 AMENDED PETITION FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF

COMES NOW Viking Construction, Inc., an Idaho corporation, Plaintiff, by and through its attorney, Scott Rose, and for cause of action against the Defendant Hayden Lake Irrigation District, an Idaho quasi-municipal corporation hereby petitions, complains, and alleges as follows:

COUNT I

DECLARATORY RELIEF

1. At all relevant times Plaintiff herein, Viking Construction, Inc., an Idaho Corporation in good

standing (hereinafter referred to as "Viking") residing in the City of Hayden, County of Kootenai, State of Idaho, owned and owns multiple parcels of land within the boundaries of the Hayden Lake Irrigation District (hereinafter referred to as "Irrigation District"), and as such is a water user with water rights within said Irrigation District. Plaintiff is an interested person as defined by Section 10-1201, *et seq.*, Idaho Code.

2. At all material times alleged herein, Defendant, Hayden Lake Irrigation District, an Idaho quasi-municipal corporation resided in the City of Hayden, County of Kootenai, State of Idaho.

3. Venue is proper in Kootenai County pursuant to and by virtue of Idaho Code Section 5-404.

4. This Court has subject matter jurisdiction in this action and the damages herein are in excess of $10,000; and the monetary amounts in controversy exceed the minimum jurisdictional amounts of the District Court. Viking finds itself in jeopardy and has no relief save from submission of the issue to a court of equity for the determination of (1) whether or not the Charge imposed by the Irrigation District, is permissible or not permissible, (2) whether or not the increase in the amount of the Charge imposed by the Irrigation District, is permissible or not permissible, and (3) whether or not the immediate implementation of the increase in the amount of the Charge imposed by the Irrigation District, is permissible or not permissible. But for the relief set out herein, there is no adequate remedy available to Viking for the deprivation of its Civil Rights.

5. Plaintiff desired and continues to desire to construct new homes on its real property lying within the boundaries of the Hayden Lake Irrigation District.

6. [Deleted]

7. The Hayden Lake Irrigation District required Plaintiff (and continues to require Plaintiff over its objections) to pay money. These payments are often fallaciously and spuriously referred to for

instance as "tap-on fees" "hook on fees", "hook up fees", "connect fees", and/or "connection fees" (hereinafter referred to as "Charges"). The nomenclature is misleading: (1) the payments do not pay for any type of physical connection; (2) the payments are neither a fee nor are they regulatory in nature; and (3) the Irrigation District has not invoked its police powers to the extent it has police powers by passage of an ordinance permitting the constraint and regulation of business by means of a fee.

8. Viking's Charges paid to Hayden Lake Irrigation District are believed and therefore alleged to be in the amount of One Million Five Hundred Eighty-Nine Thousand One Hundred Sixty-Three Dollars ($1,589,163). Presently Viking anticipates future payment to the Irrigation District for Charges. The acts of the Irrigation District against Viking places Viking in jeopardy.

9. Plaintiff believes and therefore alleges that the Hayden Lake Irrigation District's requirement for payment of a Charge is without statutory basis. According to Titles 42 and 43 of the Idaho Code, irrigation districts may only raise revenue by issuance of bonds, by yearly assessments, and by special assessments. There is no authority for a Charge. Plaintiff further believes and therefore alleges that the Irrigation District did not implement the police powers to the extent it has police powers by passage of an ordinance required to make regulations or charge fees. It only has the statutory given specific regulation making power, which does not provide for Charges or fees. Even if the Charges were a fee, it is none-the-less unlawful, because a fee must be reasonably related to what is given for the fee. The District provides nothing new in exchange for the Charge.

10. Plaintiff further believes and therefore alleges that the Hayden Lake Irrigation District's requirement for payment of a Charge is an equal protection and due process right violation of the US Constitution and the Constitution of the State of Idaho. Assessment rates and special assessment

rates must be applied to all landowners equally. Plaintiff further believes and therefore alleges that the Charge violates Article VII, Sections 4 and 5 of the Idaho Constitution as well, as it is at best a tax which is not uniformly applied.

11. Plaintiff further believes and therefore alleges that the Charge is really nothing but a disguised unconstitutional tax; That even if it was a tax within a constitution it is nonetheless imposed without a statutory basis or enabling legislation; That the Irrigation District does not have the requisite enabling legislation; That no new duties are required of the Irrigation District as consideration for the Charge; That nothing is received in exchange for the Charge payment; That the Charge is unlawfully applied for revenue generation; and That the Irrigation District has usurped its quasi-public trust by imposing the tax.

12. Plaintiff further believes and therefore alleges that Article VII, Section 6 of the Idaho Constitution does not give the District taxing authority beyond yearly assessments. As well, the Charge does not conform to the statutory scheme set out in the Idaho Revenue Bond Act.

13. Plaintiff further believes and therefore alleges that the Irrigation District imposition of Charges violates Article XV, Sections 4 and 5 of the Idaho Constitution, because it interferes with Viking's water rights and priority. The District holds title to the water rights in trust for the landowners. Under irrigation district law every landowner is to be treated equally. A Charge derogates the constitutional protections in Article XV and the statutory protections of due process in Section 43-404, Idaho Code. The imposition of Charges treats different land owners disparately. The imposition of Charges penalizes Viking directly and singularly, causing irreparable harm.

14. Plaintiff believes and therefore alleges that the Charge further violates the uniformity and proportionality requirements for taxes as set forth in Sections 2 and 5 of Article VII of the Idaho

Constitution.

15. Plaintiff believes and therefore alleges the Charge unjustly enriches the Irrigation District; That the Irrigation District unlawfully profiteers against its users by requiring payment of a Charge; That the Irrigation District does not own the facilities, but operates the system under contract with the Bureau of Reclamation which does own the facilities; That the profiteering is a breach and violation of the contract(s) between the Irrigation District and the Bureau of Reclamation of the United States to which Viking is a third-party beneficiary; That the non-proportional application of Charges to different water users is contrary to the requirements with the Bureau of Reclamation; That the Charge is a disproportionate burden on new homes contrary to the requirements with the Bureau of Reclamation; That the Charges divest Viking of its rights secured by existing contracts with the Bureau of Reclamation and by the reclamation laws; and that the imposition of Charges violates the Commerce Clause.

16. Plaintiff believes and therefore alleges that the Irrigation District's imposition of Charges is Ultra Vires, that its Bylaws concerning tap-on fees, hook-on fees and connection fees, i.e Charges is unlawful, and its Bylaws concerning altering, repealing, and amending the Bylaws are unlawful.

17. The Charges do not cover actual costs of connecting pipes. The Charges are collected for the Irrigation District at large, and not for each newly constructed house. Plaintiff believes and therefore alleges the exactment of Charges constitutes an unconstitutional taking of property under the Takings Clause of the Fifth Amendment made applicable through the Fourteenth Amendment and Article I, Section 10 of the Constitution of the United States, and Article I, Section 14 of the Idaho Constitution. Viking claims under 42 U.S.C. Section 1983 that the Irrigation District is depriving Viking of property without just compensation while acting under color of State law; and

therefore the Irrigation District has committed the tort of conversion by keeping property which has no right to retain.

18. Plaintiff believes and therefore alleges that the conditions and exactions by the Irrigation District are arbitrary, capricious, and unreasonable; and are an abuse of governmental power.

19. Plaintiff believes and therefore further alleges that even if there was constitutional and/or statutory authority, the Charge amount and the manner in which it was developed is unreasonable, arbitrary, and capricious.

20. Pursuant to Section 10-1201, *et seq.*, Plaintiff seeks declaratory relief from the Court to declare the rights and status of Plaintiff, as well as, to declare the whether the Charge is permissible or impermissible under the laws of the State of Idaho and the United States; That the Court should declare the imposition of Charges null and void for the reasons given above and in particular without limitation because the Charge is at best a tax disguised as a fee; and That the Court Order the imposition of Charges as unconstitutional.

COUNT II

DECLARATORY RELIEF

21. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 20 of this Complaint.

22. At the Hayden Lake Irrigation District regular meeting on September 7, 2004, Defendant, amended and raised its commercial and domestic Charge, implementing the increase beginning immediately the following day, on September 8, 2004. The domestic Charge increased from $2200 per house to $2700 per house. The commercial Charge increased substantially, as well.

23. Prior to the September 7, 2004, regular meeting of Defendant, Viking sold sixty-five (65)

houses for delivery after September 8, 2004, at a contract price based on the $2200 Charge; and has exhaustively requested the Hayden Lake Irrigation District provide time before implementation of its Charge increase without avail. The Irrigation District will not provide water unless it receives payment of $2700 per home as a Charge. Viking is suffering irreparable injury.

24. Plaintiff believes and therefore alleges that the Hayden Lake Irrigation District's Charge increase violated procedural and substantive due process protections. In particular the Irrigation District failed to provide proper notice of its proposed Charge increase or the reasonable opportunity to be heard on the proposed increase. Plaintiff believes and therefore alleges that the Irrigation District, prior to implementation of the increase should have at least published the reasons for adopting the increase, the amount of the increased, and the date on which the increase would become final and effective. Furthermore Plaintiff believes and therefore alleges that the little notification which was given was faulty. The Irrigation District only gave notice of a "Rate Increase" which implied that it had to do with assessments, not Charges, and as such that notice was clearly misleading and not substantively correct. Viking repeatedly requested copies of all notices of public hearings scheduled regarding the proposed Charge increase, and the only written notice provided by the Irrigation District is attached and fully incorporated herein as Exhibit No. 1(a) and Exhibit No. 1(b).

25. Plaintiff further believes and therefore alleges that the immediate implementation of Hayden Lake Irrigation District's Charge increase violated procedural and substantive due process protections; That proper notice of the immediate implementation was not provided; and That there was no reasonable opportunity to be heard about the immediate implementation.

26. Pursuant to Section 10-1201, *et seq.*, in the event the Court finds the imposition of a Charge

is permissible, then Plaintiff seeks declaratory relief from the Court to declare the rights and status of Plaintiff, as well as, to declare the whether the increase is permissible or impermissible under the laws of the State of Idaho and the United States; and That the Court Order that the increase in amount of the Charge as unconstitutional.

27. Furthermore, pursuant to Section 10-1201, *et seq.*, in the event the Court finds the imposition of a Charge is permissible and finds that the increase is permissible, then Plaintiff seeks declaratory relief from the Court to declare the rights and status of Plaintiff, as well as, to declare the whether the immediate implementation of the increase is permissible or impermissible under the laws of the State of Idaho and the United States; and That the Court Order that the immediate implementation of the increase in amount of the Charge as unconstitutional.

COUNT III

INJUNCTIVE RELIEF

28. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 27 of this Complaint.

29. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from imposing and collecting future Charges.

30. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest.

COUNT IV

REIMBURSEMENT

31. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the

allegations contained within the preceding paragraphs 1 - 30 of this Complaint.

32. Viking paid Charges to Hayden Lake Irrigation District in an amount believed and therefore alleged to be in excess of One Million Five Hundred Eighty-Nine Thousand One Hundred Sixty-Three Dollars ($1,589,163).

33. Viking believes and therefore alleges that it should be reimbursed for all the monies it paid to the Irrigation District plus interest, together with costs and attorney's fees.

COUNT V

Bylaws Not Lawful Regarding Amendment Sections

34. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 33 of this Complaint.

35. Plaintiff believes and therefore alleges that the adoption of the August 3, 1915 Hayden Lake Irrigation District (HLID) By-Laws, Section 9 of the General Provisions page 6, is and was unlawful and without legal effect, as are all future By-Laws adopted by the HLID concerning the same subject matter of Section 9 concerning the Board of Director's authority to alter, amend or repeal the By-Laws, on the grounds and for the reasons that it (a) constitutes an ultra vires act, (b) violates constitutional due process requirements of notice, the opportunity to be heard, as well as, the opportunity to vote, and (c) violates State law.

36. Plaintiff believes and therefore alleges that all Hayden Lake Irrigation District By-Laws adopted after the 1915 By-Law be declared null and void; and that August 3, 1915 Hayden Lake Irrigation District (HLID) By-Laws, Section 9 of the General Provisions page 6, be stricken and declared null and void.

37. Plaintiff should be awarded a mandatory injunction preventing and enjoining

Defendant from altering, amending or repealing the By-Laws without due process such as prior ratepayer notice, opportunity to heard, an election by the ratepayers.

38. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest, costs and attorney's fees.

COUNT VI

Bylaws Not Lawful Regarding Ratepayer Notice Sections

39. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 38 of this Complaint.

40. Plaintiff believes and therefore alleges that the adoption of the August 3, 1915 Hayden Lake Irrigation District (HLID) By-Laws, Section 9 of the General Provisions page 6, is and was unlawful and without legal effect, as are all future By-Laws adopted by the HLID concerning the same subject matter of Section 9 concerning the two week notice provision for the Board of Directors to alter, amend or repeal the By-Laws, on the grounds and for the reasons that it (a) constitutes an *ultra vires* act, (b) violates constitutional due process requirements of notice, the opportunity to be heard, as well as, the opportunity to vote, and (c) violates State law.

41. Plaintiff believes and therefore alleges that all Hayden Lake Irrigation District By-Laws adopted after the 1915 By-Law be declared null and void; and that August 3, 1915 Hayden Lake Irrigation District (HLID) By-Laws, Section 9 of the General Provisions page 6, be stricken and declared null and void.

42. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendant from altering, amending or repealing the By-Laws without due process such as prior

ratepayer notice, opportunity to heard, an election by the ratepayers.

43. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest, costs and attorney's fees.

COUNT VII

Bylaws Not Lawful Regarding Board of Director Notice Sections

44. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 43 of this Complaint.

45. Plaintiff believes and therefore alleges that all Hayden Lake Irrigation District By-Laws adopted after the 1915 By-Law be declared null and void; and that August 3, 1915 Hayden Lake Irrigation District (HLID) By-Laws, Section 9 of the General Provisions page 6, be stricken and declared null and void concerning the provision enabling the Board of Directors authority to alter, amend or repeal the By-Laws without any prior notice at all to either the owners of lands subject to assessment within the District or to the Board members.

46. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendant from altering, amending or repealing the By-Laws without due process such as prior notice, opportunity to heard, an election by the Board of Directors.

47. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest, costs and attorney's fees.

COUNT VIII

1947 Bylaws Not Lawful Regarding Charging For Tap-on Fees

48. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 47 of this Complaint.

49. Plaintiff believes and therefore alleges that the adoption of the August 19, 1947 Hayden Lake Irrigation District By-Laws, Section 11, as are all future By-Laws concerning the same subject matter of Section 11 adopted by the HLID allowing for a fee to be charged for tapping to the main for domestic purposes, is and was unlawful for (a) being an *ultra vires* act, (b) violating constitutional due process requirements of notice, the opportunity to be heard, as well as, the opportunity to vote, (c) violating State law pertaining to quasi-municipal entities; and (d) breaching contracts between the United States and the HLID;

50. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendant from charging a fee without compliance with passage of an ordinance requirements and the Idaho Development Impact Fee Act, Section 67-8201, etc., Idaho Code.

51. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest, costs and attorney's fees.

COUNT IX

1947 Bylaws Not Lawful Regarding Multiple Tap-on Fees

52. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 51 of this Complaint.

53. Plaintiff believes and therefore alleges that the adoption of the adoption of the August 19, 1947 Hayden Lake Irrigation District By-Laws, Section 11, as are all future By-Laws concerning the same subject matter of Section 11 adopted by the HLID allowing for multiple fees

to be charged for additional tapping to the main within a tract, is and was unlawful for (a) being an *ultra vires* act, (b) violating constitutional due process requirements of notice, the opportunity to be heard, as well as, the opportunity to vote, (c) violating State law pertaining to quasi-municipal entities; and (d) breaching contracts between the United States and the HLID.

54. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendant from charging multiple fees on land within the District.

55. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest, costs and attorney's fees.

COUNT X

1947 Bylaws Not Lawful Regarding Notice Sections

56. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 55 of this Complaint.

57. Plaintiff believes and therefore alleges that the adoption of the August 19, 1947 Hayden Lake Irrigation District By-Laws are and were unlawful for failing to give notice and for failing to put its adoption to the vote of the ratepayers.

58. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendant from adopting the 1947 By-Laws.

59. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest, costs and attorney's fees.

COUNT XI

2002 Bylaws Not Lawful Regarding Due Process

60. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 59 of this Complaint.

61. Plaintiff believes and therefore alleges that the adoption of the May 7, 2002 Hayden Lake Irrigation District By-Laws are and were unlawful for failing to give notice and for failing to put its adoption to the vote of the ratepayers.

62. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendant from adopting the 2002 By-Laws.

63. Plaintiff should be awarded a mandatory injunction preventing and enjoining Defendants from keeping Charges already collected; and be Ordered to return all monies it collected as Charges, reimbursing Viking fully, plus interest, costs and attorney's fees.

COUNT XII

Application of the Idaho Development Impact Fee Act

64. The Plaintiff hereby incorporates by reference, as though fully set forth herein, all of the allegations contained within the preceding paragraphs 1 - 59 of this Complaint.

65. Plaintiff seeks Declaratory Relief concerning the meaning of "Connection or hookup charges" in Section 67-8203(9)(b), I.C., the Idaho Development Impact Fee Act.

66. Plaintiff believes and therefore alleges that the statutory meaning of "Connection or hookup charges" in Section 67-8203(9)(b), I.C., the Idaho Development Impact Fee Act is for actual physical costs of connecting to a water system.

67. Plaintiff believes and therefore alleges that defining "Connection and hookup

charges" beyond actual physical costs would enable any governmental entity to avoid Development Impact Fees and/or other provisions of the "Idaho Development Impact Fee Act" by simply naming charges: connections or hookups.

68. Plaintiff seeks Declaratory Relief that the Idaho Development Impact Fee Act applies to the HLID, for a finding that in order for the HLID to charge a fee it must comply with the Idaho Development Impact Fee Act requirements; for a finding that the revenue HLID generates by charging for a connection fee is not excluded from the Act as "Connection and hookup charges"; and that the police power ordinance was not implemented even though the Charges are an non-excluded impact fee.

WHEREFORE, Plaintiffs pray for relief and judgment against Defendants as follows:

1. An order from this Court providing for a speedy hearing on the actions for declaratory judgment, and prays that the matter be advanced on the calendar pursuant to the authority of Rule 57, IRCP;

2. An order declaring the imposition of Charges null and void;

3. An order declaring the increase in the amount of the Charges null and void;

4. An order declaring the immediate implementation of the increase in amount of the Charges null and void;

5. An order enjoining and restraining the Defendant from imposing Charges;

6. An order directing Defendant to reimburse to Plaintiff all Charges paid plus interest thereon;

7. An order declaring the 1915 By-laws Section 9 and all later By-laws unlawful and without legal effect concerning the authority to alter, amend or repeal the By-laws;

8. An order declaring the 1915 By-laws Section 9 and all later By-laws unlawful and

without legal effect concerning the notice provision to ratepayors;

9. An order declaring the 1915 By-laws Section 9 and all later By-laws unlawful and without legal effect concerning the notice provision to Directors;

10. An order declaring the 1947 By-laws Section 11 and all later By-laws unlawful and without legal effect concerning the charging of Tap-on fees;

11. An order declaring the 1947 By-laws Section 11 and all later By-laws unlawful and without legal effect concerning the charging of multiple Tap-on fees;

12. An order declaring the 1947 By-laws Section 11 and all later By-laws unlawful and without legal effect for failing to give notice of its proposed adoption, for failing to give an opportunity to be heard, and for failing to put the matter to a vote of the ratepayors;

13. An order declaring the 2002 By-laws unlawful and without legal effect for failing to give notice of its proposed adoption, for failing to give an opportunity to be heard, for failing to put the matter to a vote of the ratepayors, and for failing to comply with procedural and substantive due process;

14. An order finding application of the Idaho Development Impact Fee Act to the HLID, defining the meaning of "Connection or hookup charges" in Section 67-8203(9)(b), I.C., and an order finding that the Charges in this matter are not within the meaning of "Connection or hookup charges" in Section 67-8203(9)(b), I.C., the Idaho Development Impact Fee Act;

15. For reasonable attorneys fees and costs incurred in prosecution of this Complaint;

16. For all such other relief as may be available under the law which the court deems just and

equitable under the circumstances.

DATED this 27 day of March, 2008.

SCOTT ROSE

By: _____
Attorney for Plaintiffs

VERIFICATION

I, Wendell Olson, hereby verify that I have read the foregoing Complaint and affirm that it is true and correct to the best of my knowledge.

Viking Construction, Inc.

By: _____
Its President

SUBSCRIBED AND SWORN to before me this 26 day of March, 2008.

DUSTY L. DIONNE NOTARY PUBLIC STATE OF IDAHO

_____
NOTARY PUBLIC for Idaho
Residing at Coeur d'Alene, Idaho
My Commission expires: 9/2/2009

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 28 day of March, 2008, a true and correct copy of the foregoing Amended Petition was mailed to Defendant, by placing said pleading in the U.S. Regular Mail postage prepaid addressed to:

Susan Patricia Weeks
Attorney at Law, Owens, James, Vernon & Weeks, PA,
1626 Lincoln Way
Coeur d'Alene, ID 83814.

_____

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:
2008 AUG -8 PM 1:06
CLERK DISTRICT COURT
DEPUTY

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702

(208) 342-2552 Telephone
(208) 342-3669 Fax
scott@idahoiplaw.com

Idaho State Bar #4197

Plaintiffs' Attorney

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District, an Idaho quasi-municipal corporation, Defendants.	CASE NO.: CV 04-8889 OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes now Plaintiff, by and through its attorney of record, Scott Rose, and submits this Opening Brief in support of Plaintiff's Motion for Summary Judgment.

A.

Introduction

The Hayden Lake Irrigation District (hereinafter, "District") charges a tax when a consumer or user of water for a newly built house desires access to water. The tax is misnamed

as a fee interchangeably, for example as a "hookup fee", "tap-on fee", "hook-on fee", or "connection fee" (hereinafter, "Tap-on Fee"). In the Complaint it is referred to as a "Charge."

New users make a capital investment into the general fund for unidentified future expansion of the water system. Tap-on Fees are the Board's primary method of obtaining cash reserves. Tap-on Fees are an end-run around the requirement of elections and ratepayer approval.

Tap-on Fees are void. Tap-on Fee increases are also void. Both Tap-on Fees and their increases violate Idaho Constitution Article 12, § 2. They are not created or applied pursuant to ordinances with due process of notice or opportunity to be heard. Tap-on Fees are not reasonably related to services provided. Tap-on Fees are not in accord with the contract terms entered between the District and the United States. Furthermore, Tap-on Fees are not in accord with the Idaho Development Impact Fee Act, Irrigation District Domestic Water System Revenue Bond Act, I.C. Title 42, or I.C. Title 43 as the Districts' vehicle to acquire revenue. Tap-on Fees are really a tax. As a tax they are void because they are in violation of the Idaho Constitution Article VIII § 3, Article VII §§ 6, 5 and 2, Article XV §§ 2, 4 and 5, Article I § 14, as well as, Article I § 10 of the United States Constitution, and the 5th Amendment through the 14th Amendment.

Plaintiff seeks relief on summary judgment as a matter of law on its claim Tap-on Fees are (1) unconstitutional, (2) violate Idaho and federal statutory law, and (3) breach the contracts between the District and the United States. Plaintiff further respectfully requests the Court enjoin the District from denying new users in the District access to their water, and enjoin the District from collecting Tap-on Fees. Plaintiff further respectfully requests the Court order return of all the Tap-on Fees Plaintiff paid to the District from September 8, 2000 forward to the present. I.C. § 5-224. Plaintiff also further respectfully requests costs and an award of attorney fees.

B.

FACTUAL BACKGROUND

District predecessor, Interstate Irrigation District, a privately owned Washington corporation registered as a foreign corporation in Idaho on September 15, 1906, and platted the Hayden Lake Irrigation Tracts on July 29, 1910. District, a quasi-municipal corporation, was formed from its predecessor the Interstate Irrigation District in 1914 pursuant to the Carey Act and Reclamation Act of 1902 and to Idaho law. (Aff. Ex. A, pp. 1-7). According to the Supreme Court of the United States, in part:

> The official reports show that, in 1902, there were in sixteen states and territories 535,486,731 acres of public land still held by the government and subject to entry. A large part of this land was arid, and it was estimated that 35,000,000 acres could be profitably reclaimed by the construction of irrigation works. The cost, however, was so stupendous as to make it impossible for the development to be undertaken by private enterprise; or, if so, only at the added expense of interest and profit private persons would naturally charge. With a view, therefore, of making these arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of all public lands in these sixteen states and territories should constitute a trust fund to be set aside for use in the construction of irrigation works,-the cost of each project to be assessed against the land irrigated, and as fast as the money was paid by the owners back into the trust, it was again to be used for the construction of other works. Thus the fund, without diminution except for small and negligible sums not properly chargeable to any particular project, would be continually invested and reinvested in the reclamation of arid land. See H. R. Report No. 1468, 57th Congress, 1st session.
>
> The general outline of this plan was approved by Congress, which, on June 17, 1902 (32 Stat. at L. 389, chap. 1093), passed 'An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories to the Construction of Irrigation Works for the Reclamation of Arid Lands.'(fn1)
>
> The statute provided that the money arising from the sales of the public lands in these states and territories was to be known as the reclamation fund, and was to be used for the purpose of reclaiming arid lands. Provision was made for preliminary surveys, and when the Secretary determined that a project was practicable, he was authorized to make contracts for its construction, if there were funds available. The

> land capable of being irrigated was to be open only to homestead entry, and (4-6) the Secretary was then to give notice of the charges which should be made per acre and the number of instalments, not exceeding ten, in which the charges should be paid; these charges to be determined with a view of returning to the reclamation fund the estimated costs of the construction of the project, . . . and all moneys received from the above sources shall be paid into the reclamation fund. . . .

(Swigart v. Baker, 229 U.S. 187, 33 S.Ct. 645 (1913)).

Pursuant to the Reclamation Act (1902) the United States finances the construction of irrigation projects and works, recovers its costs by means of repayment contracts with (the landowners through) the irrigation district, so that the cost of an irrigation project is assessed against the property benefitted. *(Reclamation Act (1902) Modification of Act (1922), 42 Stat. 541.; Reclamation Act as amended (1939)).* To facilitate the purpose Congress passed the Reclamation Extension Act of 1914, which at Section 7 authorized the Secretary of the Interior to appoint an irrigation district as ". . . the fiscal agent of the United States to collect the annual payments on the construction charge of the project and the annual charge for operation and maintenance and all penalties. . . ." 38 Stat. 688; 43 U.S.C. 477.

The State of Idaho statutory scheme at Title 43 authorizes creation of an irrigation district pursuant to the plan contemplated by Congress embodied in the Reclamation Act. State statutory law controls appropriation and distribution of water to ratepayers. *California v. United States*, 438 U.S. 645,650, 98 D.Ct. 2985, 2988 (1978). Thereunder assessments for construction, maintenance and operation costs are carried on pursuant to contracts with the Bureau of Reclamation. Irrigation districts may only exercise the governmental function of raising revenue to defray the expenses of irrigation systems within the irrigation district through its ratepayers. *Indian Cove Irrigation District v. Prideqaux*, 25 Idaho 112, 136 P. 618 (1913).

Initially the District borrowed $150,000 for construction through the Bureau, refinanced and decreased its geographic footprint in 1933. The District and the United States thereafter entered into four contracts, namely the: 1949 Contract, 1957 Contract, 1962 Contract, and 1977 Contract. Pursuant to the Contracts and statutory schemes the District has the limited power to annually assess members for distribution and use of water uniformly and apportioned equitably. (43 U.S.C.A. § 461).

The District first instituted Tap-on Fees in 1947 when the District amended its Bylaws to provide for Tap-on Fees. As will be addressed below the initial Bylaws did not comply with statutory requirements and the amendment was in violation of I.C. § 42-2401. The 1947 Amended Bylaws were adopted without notice, opportunity to be heard, or a vote by the ratepayers. The Tap-on Fee amount increased marginally with later Bylaw amendments also without notice, opportunity to be heard, or a vote by the ratepayers. After the water quality and District-financial problems of the 1980's Tap-on Fee increases became more pronounced. (Aff. Ex. A, pp. 38, 40, and 42). The District Tap-on Fee amount escalated exponentially after the defeat of the unpopular 2001 bond election. (Aff. Ex. A, pp. 43-56). An earlier bond election also failed. (Aff. Ex. A, pp. 34-37, 105)

The question about the lawfulness of Tap-on Fees came about because the District increased the amount of the Tap-on Fees by $500 on the evening of September 7, 2004, implementing the increase immediately first thing on the morning of September 8, 2004. (Aff. Ex. A, pp. 138-139). At the time, Plaintiff had 65 homes sold based on the pre-increase Tap-on Fee amount. The increase cost Plaintiff the additional amount of $32,500 on the 65 pre-sold homes. The District refused to give Plaintiff 90-to-180 days time to digest and close on the pre-

sold homes at the pre-increase Tap-on Fee amount. Thus Plaintiff filed its Petition for Declaratory Relief and Injunctive Relief to resolve the legal questions whether a Tap-on Fee and/or the Tap-on Fee increase were lawful.

The motivation for the increase was predicated on predictions of future requirements for more wells and infrastructure due to future growth. (Aff. Ex. A, pp. 138 - 140). According to Cathy Meyer of the McCall & Landwehr accounting firm, the accountant who audits the District, "[B]eginning in January, 2002, the Board designated that hookup fees (net a charge for meters) be set aside to fund planned future water system improvements." (Meyer Depo., p. 39, l. 23 - p. 41, l. 17; p. 55, l. 16 - 58, l.1; Ex 9, p.10, Note 7). The District deposited Tap-on Fee revenue into a general fund for capital improvements beginning at least by January 1, 2002. (Meyer Depo. p. 6, l. 24 - p. 7, l. 11; p. 41, ll.13-17). "All hook up's have been going into the capital improvement fund for several months" before April 2, 2002. (Aff. Ex. A, p. 71). Prior to January 1, 2002, at least for 2001, District simply put Tap-on Fees collected into its general checking account, which is also a general fund. (Meyer Depo. p. 42, l.11-7). The District's Board of Directors contemplates future capital expenditures be incurred without the help of the Bureau at the disproportionate expense to new ratepayers. (Aff. Ex. A, p. 111).

There was a successful recall drive removing the Chairman of the Board of Directors over the proposed 2001 bond financing; and the concept of financing capital improvements with Tap-on Fees began in earnest. (Aff. Ex. A, pp. 46-47, -80). After the 2001 bond election failed the Board sought direction on how to raise money for future improvements without increasing assessments. Tap-on Fees were increased by $400 in 2001. (Aff. Ex. A, pp. 57). The Board then unsuccessfully tried to run the funding as an ordinary and necessary expense. (Aff. Ex. A, pp. 58-

62). The momentum for using Tap-on Fees increased. (Aff. Ex. A, pp. 63-65((2)).

Like the initial creation of Tap-on Fees the decision to increase the amount was made unilaterally without an authorizing ordinance. The Board failed to provide notice, opportunity to be heard, input from its elector-landowning ratepayers, or the ratepayers' approval. The September 7, 2004, domestic Tap-on Fee increased from $2200 per house to $2700 per house. The commercial Tap-on Fee also increased substantially. Presently the District is believed to charge $2,751 per house domestic Tap-on Fee against appurtenant parcels already in the District for water access. Simply put the Board is collecting money one way or another without authority because it can shake-down lot owners, especially builders, for payment of Tap-on Fees.

C.

Issues

Plaintiff seeks a summary judgment determination that:

(1) District's imposition of Tap-on Fees violates the U.S. Constitution Article I § 10, the 5th Amendment through the 14th Amendment, and the 14th Amendment and the Idaho Constitution;

(2) District's imposition of Tap-on Fees is null and void as an unlawful tax disguised as a fee without an enabling statute, and imposed non-uniformly and non-proportionately;

(3) District's imposition of Tap-on Fees violate procedural due process, substantive due process, and equal protection;

(4) District does not have federal or state statutory authority to impose Tap-on Fees under irrigation law;

(5) To the extent Tap-on Fees are regulatory in nature the District must comply with the Idaho Development Impact Fee Act's (I.C. §§ 67-8201 et seq.) requirement to generate a plan and adopt

an authorizing ordinance to provide due process protections of notice and the opportunity to be heard;

(6) District's imposition of Tap-on Fees breaches the contracts it entered into with the U.S.A;

(7) District did not establish equitable Bylaws as required by I. C. §§ 43-304 and 43-1901 et seq;

(8) District's imposition of Tap-on Fees violates the Irrigation District Domestic Water System Revenue Bond Act (I.C. 43-1901 et seq);

(9) District must generate its revenue from ratepayers ratably and proportionately to fund capital projects; and

(10) District's imposition of Tap-on Fees and its increases are not permissible under law.

D.

Argument

1.

Introduction.

Irrigation district law requires equal treatment to every land-owning ratepayer. The imposition of Tap-on Fees treats different land owners disparately. The imposition of Tap-on Fees penalizes Viking Construction, Inc., directly and singularly, causing irreparable harm. District's Tap-on Fee and its increase unlawfully places disproportionate burdens on new users. New users are paying all the costs of improving the water facilities for the benefit to all the ratepayers within the District. "The irrigation system is a unit, to be, and intended to be, operated and maintained by the use of a common fund, to which all the lands under the system are required to contribute ratably, without regard to benefits specifically and directly received from each detail to which the fund is from time to time devoted." *Nampa & Meridian Irr. Dist. v. Bond*, 268 U.S.

50 (1925).

2.

Tap-on Fees Violate The Constitution of the State of Idaho, Article VIII, § 3.

The Constitution of the State of Idaho, Article VIII, § 3 bars irrigation districts from incurring an indebtedness, or liability, in any manner, or for any purpose, without elector approval for a proposed expenditure exceeding the income and revenue in the year in which the irrigation district incurs the indebtedness or liability other than for ordinary and necessary expenses. Because the money is being collected for future capital improvement projects the District violates Article VIII, § 3. The statutory scheme for financing capital improvement projects in I.C., Title 43, Chapters 4, 7, and 19 is consistent with the requirement for voter approval in Article VIII, § 3. Tap-on Fees are not consistent with Article VIII, § 3.

Article VIII, § 3, was designed primarily to protect taxpayers and citizens of political subdivisions. *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 49-50, 129 P. 643, 648-49 (1912). "They are the ones who would bear the consequences of the subdivision incurring excessive indebtedness. In order to do so, the framers of our Constitution granted the qualified electors of the political subdivision the constitutional right to vote upon whether the subdivision could incur indebtedness or liabilities exceeding its income and revenue for the year. It cannot do so 'without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose.' " *Koch v. Canyon County*, 177 P.3d 372, IDSCCI 33707 - 012508 (ID 2008).

The District violates Article VIII, § 3 in more than one way. First, the District is committing its resources into the future. The commitment of financial resources has been for more than one year, and presumably it will be for more than one year from the present. Second,

the commitment is to finance the liability regarding future capital improvements. Third, the financing of future capital improvements necessarily contemplates a plan incurring liability. Fourth, financing future capital improvements with Tap-on Fees will unavoidably impact future assessment rates and assessments. *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989).

"Broadly speaking, Article VIII, § 3 imposes two requirements to be met by local governments before incurring indebtedness. The first requirement is a public election securing two-thirds of the vote, and the second is the collection of an annual tax sufficient to pay the debt within thirty years." (*City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 ((2006)). Because the District does not want to collect annual tax sufficient to pay a debt necessary to finance capital improvement projects it is avoiding public election altogether through Tap-on Fees. The tax relates to indebtedness and liability exceeding the income and revenue in the year of the tax without elector approval. The Tap-on Fee violates ID. Const. Art. VIII, § 3.

3.

Tap-on Fees Violate the Constitution of the State of Idaho, Article 12, § 2.

Irrigation districts have limited authority to regulate pursuant to their police powers for "the collection of revenue incidental to the enforcement of that regulation." *Idaho Building Contractors Association v. City of Coeur d'Alene*,126 Idaho 740, 890 P.2d 326 (1995); Id. Const., Art. 12, § 2. The Idaho legislature granted the District police power authority pursuant to I.C. §§ 42-101, 42-220, 42-4201 and 42-3212 to adopt an ordinance concerning the health, safety and welfare of its ratepayers. *Potts Construction Company v. North Kootenai Water District*, 141 Idaho 678 116 P.3d 8 (2005). Passage of an ordinance requires and ensures protection of due

process, such as hearing(s), notice(s), and opportunities to be heard, as well as, protection from the arbitrary and capricious nature of how the District sets Tap-on Fee amounts.

Furthermore the District did not comply with the Development Impact Fee Act at, I.C. §§ 67-8201 et seq. The Development Impact Fee Act sets out the due process protections the District ignored. The Development Impact Fee Act requires governmental entities to meet a number of conditions before imposing impact fees for planning and financing public facilities needed to serve new growth. I.C. §§ 67-8202, 67- 8204. For starters under the Development Impact Fee Act the District needed a plan, and must provide notice and the opportunity to be heard.

There is no dispute in facts the District has not adopted an ordinance allowing for Tap-on Fees. Therefore the Tap-on Fees can not in the first instance be viewed as a regulatory fee within the District's police powers. The collection of Tap-on Fees violates the Idaho Constitution, Article 12, § 2.

4.

The Tap-on Fee is Not a Regulatory Fee.

As stated above, the District did not attempt to pass an authorizing ordinance making regulations concerning Tap-on Fees from which to collect a fee. Without passage of an ordinance, the Tap-on Fee on its face is not a regulatory fee, but is therefore by default, and in fact, a tax. Even still Tap-on Fees are not a regulatory fee, because they do not function like a real fee.

Tap-on Fees covers no actual costs involved in the physical application of water. The District's Bylaws require the landowner (builder) to pay the District for parts and labor (meters, administration and installation). (*Bylaw, Article 8*). The District's Bylaws require that the

landowner (builder) pay the costs for transporting water from the point of delivery to the point of application. (*Bylaw, Article 5*). Charging the landowner (builder) thereafter for parts and labor (meters, administration and installation) and transportation of water through Tap-on Fees burdens the landowner (builder) twice. The District bears no actual costs involved in the physical application of water, and the District passed no regulation for Tap-on Fees to related to regarding the physical application of water. Therefore the Tap-on Fees do not relate to the cost of enforcement of a regulation.

The "meter set" is paid by the developer. (Aff. Ex. A, pp. 72, 84, 87, 109). The actual connection to the meter is carried out by the landowner (builder). The District requires developers to construct the infrastructure, parts and labor within the District to service the residential lots located in a new development. Thereafter a developer transfers the water system infrastructure built to the District. (Meyer Depo., p. 45, l.11 - p. 48, l. 21; Ex. 12, 13, and 14, Ex. 9, note 10; Aff. Ex. B).

Since all the direct costs involved in "connecting" are paid by others, the Tap-on Fee is merely a revenue generating tax and not a regulatory fee. Furthermore there is no rational relation between the Tap-on Fee *amount* and any reasonable or actual costs to District. A regulatory fee must reasonably relate to the cost of the underlying regulation and a tax requires an enabling statute. *City v. Chubbuck v. City of Pocatello,* 127 Idaho 198, 899 P.2d 411 (1995). Tap-on Fees are a forced contribution upon select ratepayers to serve public needs at large.

Its worth noting the District expended $372,401 for additional fixed assets in 2004. (Meyer Depo., p. 59, ll.3-22; Ex. 16). Almost half of that amount was paid for just with the Tap-on Fees Plaintiff paid relative to the 65 homes ($175,500) immediately impacted by the overnight

increase in September 2004. Besides banking Tap-on Fees for new capital assets (more wells) in the future, District also expends those revenues currently for improvements and additions to the existing system, such as the software for remote monitoring of wells and pumps (SCADA system) costing over $200,000. (Meyer Depo., p. 48, l. 22 - p. 50, l. 5; p. 52, l.18 - p. 54, l. 22; Ex.9, note 7, Ex. 11).

In *State v. Nelson*, the Supreme Court explained the difference between a fee and a tax, in part, as follows:

> A license that is imposed for revenue is not a police regulation, but a tax, and can only be upheld under the power of taxation. (Kansas City v. Corrigan, 18 Mo. App. 206.) A city or village cannot, in the exercise of its police power, levy taxes. (Mankato v. Fowler, 32 Minn. 364, 20 N.W. 361; Pitts v. Vicksburg, 72 Miss. 181, 16 So. 418; 3 McQuillin on Municipal Corporations, sec. 991.)
>
> One of the distinctions between a lawful tax for regulatory purposes and one solely for revenue is: If it be imposed for regulation, under the authority of sec. 2, art. 12, of the constitution, the license fee demanded must bear some reasonable relation to the cost of such regulation; but if it is imposed under the general taxing power and can be lawfully maintained under such taxing power granted by the organic law, then the amount of such tax that can be imposed upon the citizens or business rests wholly within the discretionary power of the taxing authority.

State v. Nelson, 36 Idaho 713, 213 P. 358 (1923).

In *Potts Const. Co. v. North Kootenai Water Dist.*, the Idaho Supreme Court further explained, as follows:

> Generally police powers consist of government conduct that has "for its object the public health, safety, morality or welfare." 6A Eugene McQuillin, The Law of Municipal Corporations, Police Powers § 24.28 (3d ed. 1997). A municipality may collect fees considered incidental to regulation and enacted pursuant to the municipality's police powers. Idaho Const. art. 12 § 2; Idaho Bldg.

> Contractors Ass'n v. City of Coeur d'Alene, 126 Idaho 740, 742-43, 890 P.2d 326, 328-29 (1995) (citations omitted). Such municipal fees must be rationally related to the cost of enforcing the regulation and cannot be assessed purely as a revenue-generating scheme. Brewster v. City of Pocatello, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988). Brewster distinguished between a fee enacted under a municipal's police power authority and one which operates as general tax on the public. Id. at 505, 768 P.2d at 768. A municipal corporation's taxes on the general public require specific legislative authorization. Id.; but see Kootenai County Prop. Ass'n v. Kootenai County, 115 Idaho 676, 680, 769 P.2d 553, 557 (1989). According to Brewster, "a fee is a charge for a direct public service rendered to the particular consumer, while a tax is forced contribution by the public at large to meet public needs."
>
> In addition to having a regulatory purpose, a municipal fee must be reasonably and rationally related to the regulatory purpose. Sanchez v. City of Caldwell, 135 Idaho 465, 468, 20 P.3d 1, 4 (2001) (citation omitted). The burden falls on the party challenging the validity of a police power to show that it is either in conflict with the general laws of the state, unreasonable or arbitrary. Plummer v. City of Fruitland, 139 Idaho 810, 813, 87 P.3d 297, 300 (2004). Whether or not an ordinance is unreasonable or arbitrary is a question of law. Sanchez, 135 Idaho at 468, 20 P.3d I (citing Lewiston Pistol Club, Inc. v. Bd. of County Comm'rs of Nez Perce County, 96 Idaho 137, 525 P.2d 332 (1974)). Generally courts are not concerned with the wisdom of ordinances and will uphold a municipal ordinance unless it is clearly unreasonable or arbitrary. Id.; State v. Clark, 88 Idaho 365, 373, 399 P.2d 955, 959 (1965).

Potts Const. Co. v. North Kootenai Water Dist., 141 Idaho 678, 116 P.3d 8 (2005).

In *Brewster v. City of Pocatello*, the Idaho Supreme Court held, "[A] fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." *Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995). "It is only reasonable and fair to require the business, traffic, act, or thing that necessitates policing to pay this expense. To do so has been uniformly upheld by the courts. On the other hand, this power may not be resorted to as a shield

or subterfuge, under which to enact and enforce a revenue-raising ordinance or stature." *Brewster v. City of Pocatello*, 115 Idaho 502, 504, 768 P.2d 765 (1988). ". . . [T]axes serve the purpose of providing funding for public services at large, whereas a fee serves the purpose of covering the cost of the particular service provided by the state to the individual." *Idaho Building Contractors Association v. City of Coeur d'Alene*,126 Idaho 740, 890 P.2d 326 (1995), citing *Alpert v. Boise Water Corp.*, 118 Idaho 136, 795 P.2d 298 (1990).

The test of whether Tap-on Fees is a regulation or a tax may be further gleaned from the test set-out in *Loomis v. City of Hailey,* 119 Idaho 434, 807 P.2d 1272 (1991). According to the Idaho Supreme Court in *Idaho Building Contractors Association v. City of Coeur d'Alene*, "In *Loomis v. City of Hailey,* we articulated a two-part test in determining the propriety of city action. 'First, we must determine whether the connection fee constitutes an impermissible tax. Secondly, we must determine whether the connection fee is appropriately and reasonably assessed.' Id. at 437, 807 P.2d at 1275. Under the first step of the analysis, we consider whether, on its face, the impact fee is a tax or a regulation. If it at least appears to be a regulation, we then reach the question of whether or not it is reasonably related to the regulated activity. If it is not reasonably related to the regulation, then it is purely a revenue raising assessment, and once again is not permissible without a specific legislative enactment." *Idaho Building Contractors Association v. City of Coeur d'Alene*,126 Idaho 740, 890 P.2d 326 (1995).

Tap-on Fees are not incidental to a regulation, are not rationally related to the cost of enforcing a regulation, are assessed purely as a revenue-generating scheme, and are not a charge for a direct public service rendered to the particular new house ratepayer. A statute, which actually imposes a tax in the guise of a fee is unconstitutional. *Chapman v. Ada County*, 48 Idaho

632, 284 P. 259 (1930).

Tap-on Fee revenue is placed into the General Fund to be expended on capital improvements both inside and outside of the development in which the new house is located, on non-capital improvements, and not for use solely in the area where the land under the new house being assessed the fees is being constructed. Tap-on Fees are commingled with assessment revenue and other revenue such as from maintenance and operation fees. Commingled (Tap-on Fee) monies have been spent on general purposes of the District. There is nothing which in any way limits the use of the revenue from Tap-on Fees. (Meyer Depo. p. 42, l.8 - p.43, l.13, Ex. 12,13, and 14; p. 61, l.18 - p.68, l.8; and p.70, l. 20 - p. 71, l. 7).

The revenue is not dedicated to repair, replace, or maintain, the water system components, nor is dedicated for operations. The revenue is without geographic limitation as to where the new capital assets will be employed. The revenue is certainly not spent on the newly constructed house. Tap-on Fees are charged in addition to parts and labor (meters, administration and installation) and transportation of water. (*Bylaws, Article 5 and 8*). Not only do Tap-on Fees not cover the costs associated with connecting, they are charged for the benefit of the ratepayers at large. The Tap-on Fees are spent like tax revenue is spent, and not spent reasonably related to any regulated activity in the application of water to a new home.

Even if Tap-on Fees were deemed to be a regulatory fee, the Tap-on Fee still fails because the amount is not appropriately and reasonably assessed. The District simply pulled the Tap-on Fee amount out of thin air, arbitrarily. Instead of simply pulling a number out of thin air, a formula to determine the proportionate share of each lot based on real costs of system additions and improvements is required to perfect a fee. A formula calculated with the help of professionals

logically justifies and targets an amount to assess, so that the fee reasonably relates to the service demands and needs of the project.

A real "fee" charged must relate to the value of the service rendered. The District's Tap-on Fee charge does not relate to the value of service rendered at all. No actual service is provided by District related to the Tap-on Fee. No calculations were made by the engineers or accountants for the district, or by the district directly relating the fee to the value of a service. There is no value of service. On its face the Tap-on Fee is a revenue measure rather that a regulatory fee. *Fosters, Inc., v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941). The Tap-on fee is not a regulatory fee, it is a tax.

According to the Board of Directors' minutes and the District's CPA, the reason for the so-called fee is because "[T]he District is growing due to development and the need for more wells and infrastructure is going to be necessary sooner than later."; (*Minutes* 9-7-04; Meyer Depo., p. 39, l. 23 - p. 41, l.17; Ex 9, p.10, Note 7). The purpose of Tap-on Fees (revenue for capital asset improvement) is on its face not a regulatory fee, but is a tax. Though the benefits are district-wide, the costs are shifted to new home buyers only. The so called, "fee" revenue is not collected to pay for the individual service associated with a new house, but is for the public at large. *Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995). A fee that is not regulatory but is imposed for revenue purposes is really a tax, even if it is called a fee. *McQuillen, Municipal Corporations*. Since it is imposing Tap-on Fees primarily for revenue raising purposes, Tap-on Fees are a tax and can only be upheld under the power of taxation. *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923).

//

5.

Tap-on Fees Violate The Constitution of the State of Idaho, Article VII, § 6.

With specific legislative authority, a quasi-municipality can impose taxes. The Constitution of the State of Idaho, Article VII, § 6, permits assessment and collection of taxes limited to the taxing power granted by the legislature. "However, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the legislature." *Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995), citing *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988). Taxing requires an enabling statute. There is no enabling statute for Tap-on Fees.

The federal and state statutes read as a whole appear to prohibit rather than allow a slush fund for unidentified expenditures for unidentified municipal projects. Rather, irrigation districts, as quasi-municipal corporations may only assess annual charges against the land within its boundaries for capital improvement projects. Taxing is limited to either general assessments, or to paying back the principal and interest on indebtedness incurred by borrowing money from the federal Reclamation Fund, borrowing money from a lending institution, and/or through the issuance of bonds.[1] I.C., §§ 43-304, -401, -1901 eq set.

Through Tap-on Fees the District Board is requiring newly tapped-in users to shoulder the burden of future construction of unidentified public capital improvement water projects, even though the land has paid pro-rata assessments since the District's inception. There is no doubt the

[1]Arguably the legislative tax authority may also be found in the Development Impact Fee Act (I.C. Title 67, Chap. 82), contingent on the municipality meeting due-process requirements. District made no effort to meet the demands of the Development Impact Fee Act or due process, and having failed to meet the contingencies no authority to tax is granted to District pursuant to the Development Impact Fee Act.

District faced unprecedented growth and fiscal problems in paying for future anticipated improvements and water supply. Nonetheless, the fiscal concerns do not allow the District to circumvent the law on municipal financing and taxation.

"The fact that additional services are made necessary by growth and development does not change the essential nature of the services provided: they are for the public at large." *Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 744, 890 P.2d 326 (1995). The statutes require the ratepayers to approve through elections an increase in obligations. The District skirts around elector approval. The District is attempting to utilize so-called Tap-on Fees instead of holding elections.

The irrigation district statutory law regarding financing project construction is consistent with taxing all the ratepayers in accordance with the enabling statutes. I.C., §§ 43-304, -401. A board of directors of an irrigation district is required to determine the aggregate amount necessary to be raised for all purposes connected with the maintaining and operating of the works of the irrigation district. The costs should be financed through annually set assessment rates against the land for repayment based on apportionment, as "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right." (43 U.S.C. § 372; I.C. §43-1823). The water delivered is to be paid for pursuant to the annually set assessment rate and proportionably. I.C. Title 43, Chapter 7.

I.C., § 43-401 requires a general project plan be formulated delineating and explaining proposed construction, costs, and how an irrigation district proposes to raise the funds for carrying out the plan. The matter must be put to a special election of the ratepayers for approval after

proper notice. Reconstruction, rehabilitation or replacement of structures and works also require a special election of the ratepayers for approval after proper notice pursuant to I.C.,§, 43-401A. I.C., § 43-329 requires proposed project improvements be adopted by the board with a resolution calling for an election by the ratepayers for the purpose of submitting the question as to whether or not the proposed improvement shall be constructed, and thereafter the board must submit the matter to the electors, after proper notice.

Pursuant to I.C., Section 43-321,

> [T]he board of directors may call a special election and submit to the qualified electors of the district the question whether or not a special assessment shall be levied for the purpose of raising money to be applied to any of the purposes provided in this title, and shall, at the same time, fix a date upon which such assessment shall become delinquent, which date shall be not less than sixty (60) days nor more than ninety (90) days from the date of said meeting of said board. Such election must be called upon the notice prescribed, and the same shall be held, and the result thereof determined and declared, in all respects in conformity with the provisions of section 43-401, [Idaho Code]. The notice must specify the amount of money proposed to be raised, and the purpose for which it is intended to be used. At such elections the ballots shall contain the words "Assessment .... yes" or "Assessment .... no." If two[-]thirds (2/3) or more of the votes cast are "Assessment .... yes," the board shall immediately levy an assessment sufficient to raise the amount voted.

Only after the ratepayers decide in favor of capital project funding is the board statutorily enabled to levy an assessment contingent upon a Court's approval. I.C., Section 43-704. The District's Board did not call a special election, provide notice, or submit the question whether or not a special assessment shall be levied to the qualified electors of the district. I.C., Section, 43-321, -329, -401, -401A.

In the present manner the Board of Directors has neither identified, nor developed a

general plan for a capital improvement project. I.C., Section 43-304, -401. The Board of Directors has not determined the amount of money it intends to spend or borrow for the unknown project. The District's Board of Directors are preventing its ratepayers from controlling its affairs ignoring the constitutional and statutory requirements for levying a tax assessment. *Nampa v. Nampa and Meridian Irrigation District*, 19 Idaho 779, 115 P. 979 (1915). The Board is charging new ratepayers a tax without an enabling statute.

There is no specific legislative enactment which specifically permits, or statutory authority granting taxing power for collection of Tap-on Fees to finance future construction of future public capital improvement projects out of concern for future expansion. *State v. Nelson, 36 Idaho 713, 213 P. 358 (1923); Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995), citing *Kootenai County Property Ass'n v. Kootenai County*, 115 Idaho 676, 769 P.2 553 (1989). Since the Tap-on Fee charged is not expressly authorized by the legislature holding otherwise would violate Article II, § 6 of the Idaho Constitution and render the express statutory finance language within the irrigation district statutes meaningless. (*Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 427, 708 P.2d 147, 150 ((1985)).

6.

Tap-on Fees Violate The Constitution of the State of Idaho, Article VII, §5 and § 2.

The Idaho Constitution Article VII, § 5 requires uniform taxation, "[A]ll taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal. . . ." "What can not be done directly because of constitutional limitations cannot be accomplished indirectly." *O'Bryant*

v. The City of Idaho Falls, 78 Idaho 313, 303 P.2d 672 (1956). Only new consumers of water are charged Tap-on Fees. Prior users are not required to make a capital investment into the general fund for unidentified future expansion of the water system. Tap-on Fees are a tax not uniformly levied and can not stand.

The Idaho Constitution Article VII, Section 2 requires proportional taxing, " . . . every person or corporation shall pay a tax in proportion to the value of his, her, or its property . . . ." Only new users are charged a Tap-on Fee. Other users in the District are not proportionately paying a Tap-on Fee tax for capital investment into the general fund for unidentified future expansion of the water system in proportion to the value of his, her, or its property. The tax not proportionately levied and therefore it cannot stand.

Consistent with the constitutional requirements of uniform and proportionate taxes, the Idaho Supreme Court held, "[A]fter an irrigation district's works have been completed, as in this case, the cost of the maintenance and operation, whether collected by means of assessments or tolls, 'shall be spread upon all the lands of the district and shall be proportionate to the benefits received by such lands growing out of the maintenance and operations of the said works of said district.' " *Gedney v. Snake River Irrigation District*, 61 Idaho 605, 104 P.2d 909 (1940), citing I.C. §§ 42-701, 42-905, and 43-1901 et seq.

The Idaho Supreme Court explained in *Little v. Nampa-Meridian Irrigation District*, the benefits and costs must be apportioned at the same rate as other users where the water needed and made available is the same, in part as follows:

> Idaho Code, §§ 43-1812, 43-1817, 43-1821, 43-1822, 43-1823 and 43-1824 provide the method and basis for assessment of operation and maintenance where the irrigation district has a contract with the

Bureau of Reclamation.

> It was the intention of the Legislature that the lands of an irrigation district should be considered as a whole and such lands must be assessed for the maintenance and operation of the water system at the same rate where the benefits, that is the water needed and received, are the same. Colburn v. Wilson, 24 Idaho 94, 132 P. 579.
>
> The Legislature in enacting irrigation district laws intended that lands irrigable by means of the system within a district should be considered as a whole, and each tract should be chargeable for maintenance and operation at the same rate as other tracts are chargeable where water needed and made available in each case is the same. Gedney v. Snake River Irrigation District, 61 Idaho 605, 104 P.2d 909.
>
> Where the benefits are uniform the assessment must be uniform and in this connection the amount of water delivered is the benefit. Thus, where the amount of delivery of the water is uniform, the assessment must be uniform. Gedney v. Snake River Irr. Dist., 61 Idaho 605, 104 P.2d 909; Brown v. Shupe, 40 Idaho 252, 233 P. 59.

Little v. Nampa-Meridian Irrigation District, 82 Idaho 167, 350 P.2d 740 (1960).

Taxes can only be imposed ratably and proportionately. Tap-on Fees are not ratably and proportionately set. Tap-on Fees cannot therefore be sustained as a tax. Tap-on Fees violate Idaho Constitution Article VII, §§ 5 and 2 respectively. Therefore Tap-on Fees are void.

7.

Tap-on Fees Violate The Constitution of the State of Idaho, Article XV, § 2,§ 4, and § 5.

Tap-on Fees interfere with landowners' appurtenant water rights. The water rights are with the land, and the land is essentially all the real property located within the District's boundaries. The landowner ratepayer can not be denied their share of the appurtenant water rights. The United States Supreme Court held in part, "[a]ppropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners. . . and the water

rights became the property of the landowners." *Ickes v. Fox*, 300 U.S. 82, 95, 57 S.Ct. 412, 416-417. The Idaho Supreme Court held, "[T]here is a statutory duty to furnish water under the Carey Act, and upon the payment of the rentals and tolls for the operation and maintenance of the system for the irrigating season of 1916, it is the duty of the company to furnish the water." *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 ((1916)), citing *Mandell v. San Diego etc. Co.*, 89 Fed 295; San Diego etc. Co. v. Sharp, 97 Fed. 394, 38 C.C.A. 220). Tap-on Fees interfere with landowners' appurtenant water rights by depriving access to water unless a Tap-on Fee is paid.

"[T]he right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law." (Const. Idaho, Article XV, §2). The new potential user is deprived his, her or its franchise interest in water unless a Tap-on Fee is paid.

"Whenever any waters have been . . . appropriated . . . distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been . . . distributed to any person who has settled upon . . . or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes. . . upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law." (Const. Idaho, Article XV, § 4). ". . . the right to continue the use of any such water shall never be denied or prevented from any other cause than

the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water." I.C. § § 42-1.01, 42-220, 42-914. Tap-on Fees neither cover the expenses for delivery of water, nor are Tap-on Fees ordinary charges and assessments. The Tap-on Fee tax is exacted even though the user did not fail to pay the ordinary charges or assessments covering the expenses for the delivery of water.

The Idaho Constitution, Article XV, §5 provides that priority in time shall give superiority of right to the use of water. Regarding priority the use of the water is by the land within the District's boundaries, and not the individual lot or the individual. Thus under Idaho Constitution, Article XV, §5 each user within the District boundaries is on equal priority. Therefore denying water to new users on lands already within the District's boundaries water except upon payment of a Tap-on Fee denies that new user's priority position.

Subdivision of the land into smaller parcels may impact the annually set assessment rates assessed against the land paid by the ratepayers. But the right to continue the use of water shall not be denied or prevented. "The Reclamation Act provides that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right. 43 U.S.C. § 372." *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (Idaho 2007). "Irrigation districts act as trustees for the landowners managing the water right, and standing in place of the landowners in cases involving the appropriation of the water. I.C. § 43-316 ("title to all property... shall be held by such district in trust for... the uses and purposes set forth in this title.") Further, I.C. § 43-1829 provides that the districts hold the water rights in trust for the landowners." *Id.*

The District holds its water rights in trust for the landowners and their assigns within its

boundaries because the right to the use of water is appurtenant to the land irrigated. Beneficial use of the water applied to the land lying within the District created the water right in the first place. 43 U.S.C. § 372; I.C. § 43-1829. Subdividing the land into smaller parcels does not remove the appurtenant relationship already existing between the water use and the land. Subdividing the land into smaller parcels neither defeats constitutional nor statutory pre-existing water rights. ID. Const. Art. I, §14 and I.C. §§42-219(5); *Bennett v. Twin Falls, etc., Co.*, 27 Idaho 643, 150 P. 336; *Nampa & Meridian Irr. Dist. v. Briggs*, 27 Idaho 84, 147 P. 75; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 101 P. 81; *Merchant's Nat. Bank of San Diego v. Escondido Irr. Dist.*, 144 Cal. 329, 77 P. 937.

"Under the constitution and laws of the state and the decisions of this court, after the water has once become appurtenant to a certain tract of land, the land and water cannot be separated to the injury of any other person or unless consented to by the owner of the land." *(Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 357, 161 P. 322 ((1916)), citing *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 76 Pac. 331, 65 L.R.A. 407). Each new consumer or user (and future ratepayer) in the District is entitled to water for being geographically located within the District's boundaries. The lot prior to subdivision already benefitted and already paid assessments since the beginning of the District's existence. Tap-on Fees interfere with pre-existing property right to water of the new ratepayer in violation of Idaho Constitution, Article XV, § 2,§ 4, and § 5 for collecting compensation from landowners for the opportunity to access water appurtenant to their land to which they share priority with prior users.

//

//

8.

Tap-on Fees and Increases Violate Constitutional Rights to Due Process and Equal Protection

(a). Procedural Due Process Violations.

The Board amended the District's Bylaws on August 19, 1947, while retaining the ability to alter, amend or repeal the Amended Bylaws. Tap-on Fees were created and adopted in the 1947 Amended Bylaws. (Aff. Ex. A, pp. 14-21). Unilateral imposition of the Tap-on Fee is found in §11 of the 1947 Amended Bylaws. Section 11 is in part, as follows: "If a tract is divided and additional taps or openings are desired for more than one service on the tract as originally platted the persons desiring such opening shall pay to the district the sum of $10 for each opening or tap to, the domestic water system."

The District 1947 minutes do not recite notice or opportunity to be heard was provided to the ratepayers before adopting the Amended Bylaws which were amended to include adoption of Tap-on Fees. The District minutes do recite the Board authorized printing of 250 copies of the Amended Bylaws after the adoption of the Amended Bylaws imposing Tap-on Fees. No other documentation showing notice and hearing accorded to District ratepayers. Subsequent Tap-on Fee increases recorded in later Amended Bylaws (1969 and 1978) were also adopted without notice or the opportunity to be heard. (Aff. Ex. A, pp. 22-33).

The Board adopted the present Amended Bylaws on May 7, 2002, without complying with I. C. § 42-2401. Article 8 of the 2002 Amended Bylaws requires new users to pay a ". . . tap-on fee for each connection to the water system plus parts and labor." (Aff. Ex. A, p.76). Article 9 concerning only "Industrial/Commerical Rates" of new business establishments states that meters are included in cost of hook-on; and for the fee amount to "Call the Office for Details." (Aff. Ex.

A, pp. 76-77). Thus the Board removed the commercial fee amount to an administrative function from being a Bylaw item. The Board administratively set domestic Tap-on Fees at a regularly scheduled September 7, 2004 meeting without amending the Bylaws again. The September 7, 2004 increase in Tap-on Fees giving rise to this action were simply passed solely as an act of the Board administratively as opposed to being raised with amendment to the Bylaws. (Aff. Ex. A, pp.138-139).

The 2004 domestic water Tap-on Fee increase was a spur of the moment decision by the Board of Directors made with passion and prejudice without notice or ratepayer input. The increase was implemented immediately, the next day. (Aff. Ex. A, p. 138-140). The immediate implementation violated procedural due process.

The Due Process clause prevents the deprivation of a property interest without appropriate procedural protection by requiring notice and an opportunity to be heard. According to the Fourteenth Amendment, in part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." "The right to enjoy property without unlawful deprivation is a "personal" right which has long been recognized. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1121, 31 L.Ed.2d 424 (1972). Both notice and a hearing are required under the Fourteenth Amendment before such a deprivation of an individual's property takes place. *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 92 S.Ct. 1983, 1994-95, 32 L.Ed.2d 556 (1972). The purpose of these requirements is not only 'to ensure abstract fair play to the individual' but to also protect the individual's use and possession of property from arbitrary encroachment. *Id.* at 81, 92 S.Ct. at 1994." *Dufur v. Nampa & Meridian Irr. Dist.*, 128 Idaho 319, 912 P.2d 687 (Ct.App.1996).

"Procedural due process requires that 'there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with notice and an opportunity to be heard.' *State v. Rhoades*, 121 Idaho 63, 72, 822 P.2d 960, 969 (1991) (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865, 872 (1950); *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62, 65 (1965)). The opportunity to be heard must occur 'at a meaningful time and in a meaningful manner' in order to satisfy the due process requirement. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998) (quoting *Sweitzer v. Dean*, 118 Idaho 568, 573, 798 P.2d 27, 32 (1990)). Due process 'is not a concept to be applied rigidly in every matter. Rather, it 'is a flexible concept calling for such procedural protections as are warranted by the particular situation.' " *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 910, 935 P.2d 169, 173 (1997) (quoting *In re Wilson*, 128 Idaho 161, 167, 911 P.2d 754, 760 (1996)). *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999). "An essential principle of due process is notice of the issues to be considered and the opportunity for an appropriate hearing before being deprived of a significant property interest." *Idaho State Bar v. Everard*, 142 Idaho 109,115, 124 P.3d 985 (2005), citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

The District arbitrarily deprived Plaintiff of its constitutional rights failing to provide procedural safeguards of notice and an opportunity to be heard. The only remotely potential notice the District provided was for the Board's September 7, 2004 meeting. As a matter of law it did not comply with due process. In Discovery Plaintiff requested copies of all notices of public

hearings scheduled regarding the proposed Tap-on Fee increase, and the only written notice provided by the Irrigation District is attached and fully incorporated herein as Affidavit Ex. A, pp. 132, 135, and 136. The Board (1) posted an agenda to the District's building door for the Board meeting which neither mentioned "hookup fee", "tap-on fee", "hook-on fee", "connect fee", "connection fee", "Tap-on Fee", or any other "fee", nor did it apprise ratepayers the Board contemplated increasing fees (Aff. Ex. A, p. 135), and (2) placed a notice in the newspaper that there was regularly scheduled meeting on the evening of the publication (Aff. Ex. A, p. 136).

The "Notice" posted on the District building's door for the September 7, 2004, Board meeting simply stated "RATE INCREASE" which at best misleadingly refers to assessment rates the District is required to set on or about the same time of year. I.C. §§ 42-1005, -3214; 43-701 et seq. The published written notice in the Coeur d'Alene Press of the Board meeting was a simple statement announcing the meeting and did not state any purpose(s) of the meeting. (Aff. Ex. A, p. 136). The September 7, 2004 Agenda also only listed rate increases. (Aff. Ex. A, p.137). As a matter of law, simply posting "Rate Increases" does not measure-up to due-process requirements. In the least, the District should have met the requirements of due process in passing an ordinance.

(b). Substantive Due Process Violations.

A substantive due process claim "protects individual liberty against certain governmental actions regardless of the fairness of the procedures used to implement them." *Cantwell v. City of Boise*, - lw080718122 (2008), citing Anderson, 137 Idaho at 517, 50 P.3d at 1012 (quoting Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125 (1992); Daniels v. Williams, 474 U.S. 327, 331 (1986)). "The Fifth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment, provides that no person shall be deprived

of life, liberty, or property without due process of law. U.S. Const. amend. V. This encompasses both procedural and substantive due process protections. In the context of legislation dealing with social or economic interests, the Court assumes a deferential review. See *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 90, 982 P.2d 917, 926 (1999). In this context substantive due process requires that legislation which deprives a person of life, liberty, or property must have a rational basis. Id. That is, the statute must bear a reasonable relationship to a permissible legislative objective. Id. The reason for the deprivation must not be so inadequate that it may be characterized as an arbitrary exercise of state police powers. Id." *Spencer v. Kootenai County*, IDSCCI 33060 - 030608 (2008).

The District failed to adopt an ordinance concerning Tap-on Fees or their increase. This failure deprived Plaintiff of the opportunity to contest the ordinance, adoption of the Tap-on Fee, or increases in the Tap-on Fee amount. Without adoption of an ordinance there is no rational basis for depriving Plaintiff of its property. Without adoption of an ordinance there is no reasonable relationship to a permissible legislative objective. With or without an ordinance, the Tap-on Fee deprives the landowner of property without due process of law.

The imposition of Tap-on Fees constitutes an unconstitutional taking of property under the Takings Clause of the Fifth Amendment made applicable through the Fourteenth Amendment and Article I, § 10 of the Constitution of the United States, and Article I, § 14 of the Idaho Constitution. "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." (Idaho Const., Article I, § 14). Tap-on Fees violate Art. I, §14, because the District is taking Plaintiff's (1) money, (2) water property right, and/or (3) value from the lot or newly constructed house without just

compensation or due process of law.

Furthermore the amount of the Tap-on Fee and the amount of the increased exaction by the District are arbitrary, capricious, and unreasonable. It is an abuse of governmental power. The manner in which the amount was derived or developed is unreasonable, arbitrary, and capricious, as well. No calculations by an engineer were made as to the amount of money reasonably and rationally related to the objectives of the District. (Aff. Ex. A, p. 142). No capital improvement project plan was created. There was no basis for arriving at the $500 increase or the $2,700 Tap-on Fee.

(c). The District Bylaws Are Not Fair and Equitable.

On August 3, 1915 the District adopted its initial bylaws. (Aff. Ex. A, pp. 8-15). The adopted Bylaws were consistent with a closely held private corporation. In particular at Section 9 the Board of Directors empowered itself to alter, amend or repeal the Bylaws without notice to the ratepayers. The current Bylaws continue to allow for the Board to unilaterally alter, amend, or repeal the Bylaws at any regular or special meeting of the Board of Directors. (Aff. Ex. A, pp. 78-79, Art. 18). As such the adopted Bylaws were not consistent with a public entity quasi-municipal corporation, violated ratepayers' due process rights, and violated the statutory requirement for bylaws to be just, fair and equitable. I.C. § 43-304.

I.C. § 43-304, empowers a board ". . . to establish equitable by-laws, . . for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same. . . ." There is no statutory authority granting a board of directors the unfettered ability to alter, amend or repeal established bylaws. Yet the District's Bylaws adopted on August 3, 1915 permitted the Board to unilaterally and without the input from

the ratepayers change the Bylaws by fiat without giving notice or opportunity to be heard to the ratepayers. Section 9 of the Bylaws, is neither an equitable bylaw to the ratepayers/electors, nor does it pass constitutional due process. As implemented the Bylaws empowered the Board to take the ultimate decision making as to whether to incur additional expenses for projects encumbering their land away from the rate-paying electors.

Idaho Code § 42-2401 provides a statutory mechanism to amend bylaws. HLID neither complied in amending its Bylaws in 1947 creating Tap-on Fees, nor in 2002 raising the amount of Tap-on Fees. The legislation provides for due process protections and a two-thirds (2/3) ratepayer approval, as follows:

> 6. To change or amend its articles of incorporation or bylaws or adopt new articles or new bylaws, by a two-thirds (2/3) vote of the stock represented, at any regular meeting of the stockholders, or at any special meeting duly called for that purpose in accordance with the provisions of sections 30-310 and 30-311, Idaho Code: provided, that any proposed changes in the articles of incorporation or bylaws or any new articles of incorporation or bylaws shall be either proposed at a meeting of the stockholders or approved by at least one-third (1/3) of the board of directors; and before being finally adopted the board of directors shall cause such proposed articles, bylaws, or changes therein (or a summary of them) to be published in a newspaper of general circulation published in the county in which the main office of the canal company is situated, for at least once each week for four (4) weeks prior to the meeting at which such articles, bylaws, or changes therein are finally adopted and said notice shall state the time and place at which the vote on final adoption will be taken.

I. C. § 42-2401

Bylaws giving power to the Board to adopt, amend and repeal the bylaws without ratepayer notice, without opportunity to be heard, and without ratepayer approval are bylaws which are not equitable or just. The legislature granted boards of directors specific authority to

seek amendment of bylaws. The power to amend bylaws is not in a board's sole discretion. The power to amend bylaws is in the ratepayers' control. I. C. § 42-2401. The present day Bylaws, and in particular Articles 8, 9, and 18 of the 2002 Amended Bylaws should be declared null and void from their inception as not in compliance with governing law.

(d). Equal Protection Violations

Differential treatment to some ratepayers at the whim of the Board goes to the earlier argument on uniform and proportionate taxes, and it is an equal protection violation. Over the years the Board of Directors waived both assessments and Tap-on Fees willy-nilly. The following examples are for illustration and are not exhaustive. Friends Church's assessments were waived by the District. (Aff. Ex. A, pp. 73, 94-95 (Resolution dated February 18, 2003)). Some developers received a credit for Tap-on Fees, even though they are paid by builders and not by developers. (Aff. Ex. A, pp.81-84, 86-87, 89-90, and 73A-73B, 124 ((Resolutions 02-002 rescinded by 04-004)). Delbert Kerr and John Sperle received waivers of Tap-on Fees. (Aff. Ex. A, p. 39 and pp. 110-112). The Board established a dedicated fund, ostensibly funded by some but not all developers in the District, which are not funded by developers at all, but by builders through so-called "capitalization and hook-on fees."[2] (Aff. Ex. A, p. 128). Some multi-family projects paid one Tap-on Fee while others paid a Tap-on Fee per dwelling unit in the project. (Aff. Ex. A, pp. 68-69, 122-124). Some prior Tap-on Fees were "transferred" while others were not. (Aff. Ex. A, pp. 85-92). Mr. Sperle wanted a credit instead of a transfer, and though it is not clear whether or not he received a credit some developer(s) did. (Aff. Ex. A, pp.110-112). At least one developer received a special financial reimbursement out of Tap-on Fees for its obligatory costs associated with setting meter boxes. (Aff. Ex. A, pp. 114-116). Developers

started to receive reimbursements for meter sets out of Tap-on Fees. (Aff. Ex. A, pp. 114, 128). For those ratepayers who live in a house built before August 20, 1947, no Tap-on Fee was charged at all. The District violated Plaintiff's equal protection rights by treating it differently from other ratepayers.

(e). Advisory Committee.

The September 7, 2004 Minutes reflect that the "Advisory Committee" recommended the immediate increase. The Advisory Committee formed in 2003 first met on May 13, 2003, but it did not discuss Tap-on Fees. (Aff. Ex. A, pp. 96, 99, 101-102, 104-105, 107-108). It met again on August 18, 2003, but it did not discuss Tap-on Fees. (Aff. Ex. A, pp. 111-113). One year later the Board in its August 17, 2004 meeting called for the Advisory Committee to meet at a workshop on "rates." (Aff. Ex. A, pp. 129-130). The first and only time the Advisory Committee met on "Rates & Connect fees" was on September 1, 2004. (Aff. Ex. A, pp. 132-134). Nonetheless at this first and only Advisory Committee meeting regarding "Rates & Connect fees" held on September 1, 2004, the Advisory Committee recommended increasing Tap-on Fees by $500 to $2,700.

The September 1, 2004 Advisory Committee meeting was held without any professional engineering or accounting guidance, concerning Tap-on Fees. The Advisory Committee only looked at a "Rate Comparison Sheet" to see what it could get away with. The Rate Comparison Sheet" presented to the Advisory Committee already concluded (before the September 1, 2004 meeting) Tap-on Fees should be increased from $2,200 to $2700. (Aff. Ex. A, pp. 132-134).

There was neither notice nor opportunity to be heard regarding formation of Advisory Committee, nor sufficient notice of the one and only Advisory Committee meeting held on

September 1, 2004 which concerned Tap-on Fees. The recommendations of the Advisory Committee were neither published, nor available for inspection or reflection. Neither the Advisory Committee, nor the Board sought input from the ratepayers. There is no indication whatsoever what the basis was for the Advisory Committee calculating a $500 increase, but for comparing exactions from other water suppliers located in Kootenai County. (Depo. Rohrbach, Vol. I, p. 64, ll. 2 - 8).

Notice was not given that the Board was seeking input from an Advisory Committee about future financing of future projects through Tap-on Fees. Notice was not given of the date and time of the Advisory Committee meetings in contravention to the creation of the Advisory Committee. (Aff. Ex. A, pp. 96-108). The Advisory Committee's recommendations violated both procedural and substantive due process.

9.

Tap-on Fees Violate the Contracts with The United States

District entered into Contracts with The United States for financing improvement and replacement of the water distribution system on (1) February 16, 1949, (2) April 20, 1957, (3) March 19, 1962, and (4) September 30, 1977. (Aff. Ex. C, pp. 1 - 4). The Contracts' terms are still in effect and binding. In addition, the April 20, 1957 contract is still in repayment and its terms incorporated terms of the 1949 Contract, and both the 1962 and 1977 Contracts incorporated relevant terms of the 1957 Contract.

The Contracts transferred title to all of District's irrigation system to The United States, including the distribution system. (*1949 Contract, Art. 23; 1957 Contract, Art. 22; 1962 Contract, Art. 12; and 1977 Contract Art. 14;* Aff. Ex. C, pp.1-4). The United States holds title to

District's entire irrigation system.

Pursuant to the 1957, 1962, and 1977 Contracts, the District shall only charge residential "operating units" a uniform tract charge which is sufficient, when taken together with the acreage charge, to meet *all* the expenses of the District. (Aff. Ex. C, pp.2-4; *1957 Contract, Art. 12; 1962 Contract, Art. 12; and 1977 Contract Art. 15*; *Arizona v. California*, 373 U.S. 546, 589, 83 S.Ct. 1468, 1492-93 (1963); 43 U.S.C. Sections 491, 498; *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (Idaho 2007)). Tap-on Fees violate these Contract terms with the United States.

To equitably apportion the benefits and costs the 1957, 1962 and 1977 Contracts only allow collection of uniform annual assessments expressed as a rate per-acre of assessable land and a tract fee. This is consistent with Idaho's statutory requirement for assessments to be against the lands, not against the consumer or user(s). See I.C. §§ 43-305 and 43-306. The assessment for the support of future capital improvements benefitting all the District's ratepayers shifts the cost of the yet unknown future project(s) from the District's ratepayers at large to the new ratepayers. It shifts the assessments from against the land to people in breach of the Contracts. The 1957 Contract Article 12 and therefore the 1962 and 1977 Contracts are in part, as follows:

> 12. (a) Operating units in single ownership in the project area to which irrigation water is to be provided hereunder vary in size from less than two and one-half (2 ½) acres to approximately eighty (80) acres. The majority of the units comprise less than five (5) acres and are used primarily as suburban homesites rather than family supporting farms. The per-acre value and benefits of the works provided for by this contract are greater for these smaller sized units, and, consequently, the relative per-acre repayment ability thereof is greater.
>
> (b) Taking account of the difference in relative per-acre repayment ability, as determined by the size of the operating unit in single

> ownership, *in order equitably to apportion the benefits* derived under this contract and in accordance with the provisions of law relating thereto, the District shall make the annual assessments and charges for irrigation water on the following basis:
>
> (1) *There shall be established for each year a uniform charge* for land in the District for which irrigation water is available from the project supply, herein called the assessable land, which charge, herein called the acreage charge, shall be *expressed as a rate per-acre of assessable land*; and
>
> (2) There shall be established for each years *a uniform tract charge for each operating unit, the amount of this charge to be sufficient*, when taken together with the acreage charge, *to meet all the expenses of the District*, including its costs of operation and maintenance, its annual construction charge obligation and its requirements for maintenance of a reserve fund. . . . (*emphasis added*).

(Aff. Ex. C, pp. 2-4; Aff. Ex. D).

Since uniform assessments and tract fees are required to cover all the expenses of the District, a charge for Tap-on Fees can only be a collection of money for something other than the expenses of the District. Costs must be apportioned and assessed against the land, and paid for in relation to the apportioned benefits. Paying expenses out of Tap-on Fees breaches the District's Contracts with the United States. Charging Tap-on Fees and only charging some ratepayers Tap-on Fees are a breach of the District's Contracts with the United States. Plaintiff is a beneficiary of these Contracts. The Court should declare Tap-on Fees null and void.

10.

Tap-on Fees Violate the Irrigation District Domestic Water System Revenue Bond Act.

Tap-on Fees do not conform to the statutory scheme set out in the Irrigation District Domestic Water System Revenue Bond Act. I.C. 43-1901 et seq. In the present matter without

notice, opportunity to be heard, or ratepayer approval, the Board prevented the ratepayers from determining whether assessments, charges and tolls are to be levied. I.C., §§ 42-2401, 43-305, -306, -1901 eq set. In the present matter, the District Board has not generated a particular planned capital project whatsoever. Yet it is collecting revenue for future construction of the unidentified capital project.

The Irrigation District Domestic Water System Revenue Bond Act requires "Any irrigation district acquiring, constructing, reconstructing, improving, bettering or extending any works pursuant to this act, shall manage the works in the most efficient manner consistent with sound economy and public advantage, to the end that the services of the works shall be furnished at the lowest possible cost. *No irrigation district shall operate any works primarily as a source of revenue to the district*, but shall operate all such works for the use and benefit of those served by the works and for the promotion of the welfare and for the improvement of the health, safety, comfort and convenience of the inhabitants of the irrigation district." (emphasis added). I.C. § 43-1907.

Furthermore the works are to be self-supporting. I.C. § 43-1911. The District however is using Tap-on Fees as a source of revenue. "Unless and until full and adequate provision has been made for the foregoing purposes, *no district shall have the right to transfer the revenue of works to its general fund.*" (emphasis added). I.C. § 43-1912. Tap-on Fees are deposited into the general fund. The revenue from the works is to pay for the expenses in construction, operation, maintenance, replacement and depreciation of the works. I.C. § 43-1912. Revenue from Tap-on Fees paying for those expenses is not an option.

Pursuant to the Irrigation District Domestic Water System Revenue Bond Act to launch

construction the board must first meet numerous pre-conditions such as passing a resolution which contains information about the works to be constructed and a reference to the engineers' work product, cost estimates, and provide notice to the ratepayers. The board must hold an election of the ratepayers with a majority of ratepayers approving the measure by a proper election with proper notice. "If, at the election, a majority of the qualified electors, voting at the election, vote in favor of issuing the revenue bonds, then the district may issue the bonds and create indebtedness or liability in the manner and for the purpose specified in the resolution." I.C. § 43-1914. The Board is using the wrong mechanism to get money. In contravention to the Irrigation District Domestic Water System Revenue Bond Act is transferring Tap-on Fee revenue to its general fund. The Tap-on Fees are primarily a source of revenue to the district.

Once the ratepayers approve the construction and issuance of revenue bonds a board of directors must establish *periodic* rates, fees, tolls and charges to pay for the revenue bonds issued to construct domestic water service. I.C. §§ 43-1903, 43-1909(d) and (e). The construction payments and operation and maintenance costs, are to be proportional and the irrigation district is required to establish total annual assessments and charges against benefitted lands. I.C. § 43-1903.

The Board is using the wrong mechanism and not meeting the required procedures set-out in the Irrigation District Domestic Water System Revenue Bond Act. It has neither provided a proposed resolution or resolutions (a) setting forth a brief and general description of the works with a preliminary report or plans and specifications concerning the anticipated construction, a reference to the preliminary report or plans and specifications prepared and filed by an engineer, and (b) setting forth the costs and cost formulas estimated by an engineer and accountant; nor held

an election for the ratepayers' approval. Tap-on Fees should be invalidated as void because the proper mechanism for constructing capital projects is a revenue bond.

13.

Attorney Fees and Costs

Plaintiff respectfully requests costs and an award of attorney fees. In support of this request for attorney fees and costs it should be noted the District could have obtained a judicial determination of the validity of Tap-on Fees and increases under the Judicial Confirmation Law. I.C. § 7-1301 et seq. The District did not seek assistance pursuant to the Judicial Confirmation Law, even though it was apprised of the requirement to create reasonable formulas with professionals' assistance in enforcing an impact fee. (Aff. Ex. A, pp. 66-67, 82). Plaintiff was forced to address the issue and obtain the Court's declarations.

As well, Plaintiff respectfully requests costs and an award of attorney fees pursuant to the Private Attorney General Doctrine, 42 U.S.C. § 1983 and 42 U.S.C. § 1988, Rule 56 I.R.C.P., I.C. § 12-117 and I.C. § 12-121.

E.

Conclusion.

Summary judgment should be granted to Plaintiff as a matter of law Tap-on Fees are unconstitutional, violate Idaho and federal statutory law, and breach the contracts between the District and the United States. The District's exacts money without elections and ratepayer approval at the expense of new users for District-wide capital investments. The exaction is a tax

//

//

without an enabling statute applied non-uniformly and non-proportionately.

DATED this 8 day of August, 2008.

SCOTT ROSE

By: _____
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8 day of August, 2008, a true and correct copy of the foregoing Brief in Support of Summary Judgment was mailed to Defendant, by placing said pleading in the U.S. Regular Mail postage prepaid addressed to:

Susan Patricia Weeks
Attorney at Law
James, Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814

STATE OF IDAHO)
COUNTY OF KOOTENAI) SS
FILED:

2008 JUN 17 AM 8:58

CLERK DISTRICT COURT
DEPUTY

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702

(208) 342-2552 Telephone
(208) 342-3669 Fax
scott@idahoiplaw.com

Idaho State Bar No. 4197

Plaintiff's Attorney

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District, an Idaho quasi-municipal corporation, Defendant.	CASE NO.: CV 04-8889 ORDER ON PLAINTIFF'S MOTION FOR AN ORDER TO ENLARGE TIME TO DISCLOSE EXPERT WITNESSES

Plaintiff's Motion to Enlarge Time to Disclose Expert Witnesses having come before the Court; that Defendant stipulated to Plaintiff's motion; and with good cause appearing;

IT IS HEREBY ORDERED AND THIS DOES ORDER Plaintiff's Motion to Enlarge Time to Disclose Expert Witnesses is granted;

IT IS HEREBY FURTHER ORDERED AND THIS DOES ORDER the amendment of the Uniform Pretrial Order; Plaintiff shall disclose Expert Witnesses not later than one hundred-twenty (120) days before trial; and Defendant shall disclose Expert Witnesses not later than sixty (60) days before trial.

DATED this 15th day of June, 2008.

By: _____
Hon. John P. Luster, District Court Judge

CLERK'S CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17 day of June, 2008, a true and correct copy of the foregoing Order to Enlarge Time was served as follows: X FAXED ____ MAILED to Defendant and Plaintiff addressed to their attorneys:

Susan Patricia Weeks
Attorney at Law
Owens, James, Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814

Fax: (208) 664-1684

Scott Rose
Attorney at Law
300 West Main Street
Suite 153
Boise, ID 83702

Fax: (208) 342-3669

DANIEL J. ENGLISH
Joanna Parker
8:59am

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:
2008 AUG -8 PM 1:03
CLERK DISTRICT COURT
DEPUTY

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702

(208) 342-2552 Telephone
(208) 342-3669 Fax
scott@idahoiplaw.com

Idaho State Bar #4197

Plaintiffs' Attorney

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District, an Idaho quasi-municipal corporation, Defendants.	CASE NO.: CV 04-8889 AFFIDAVIT OF SCOTT ROSE IN SUPPORT OF SUMMARY JUDGMENT

STATE OF IDAHO)
ss.
County of Ada)

SCOTT ROSE, having been first duly sworn upon oath, deposes and says:

1. That the statements contained herein are made of your Affiant's own personal knowledge and are true and correct to the best of his information.

2. That I have read the foregoing Affidavit, know the contents thereof and believe the

statements therein contained to be true and correct;

3. Attached hereto are true and correct copies of documents acquired through discovery including but not limited to Hayden Lake Irrigation District records (Exhibit A), Audited Financial Statements (Exhibit B), and Federal Contracts (Exhibit C).

4. Attached hereto is a true and correct copy of a recent Notice of Assessment obtained directly from my client as (Exhibit D).

5. Also attached hereto are true and correct copies of the Depositions of Cathy Meyer and Bert Rohrbach (Exhibit E).

FURTHER your Affiant say naught.

Scott Rose

SUBSCRIBED AND SWORN to before me this 8 day of August, 2008

TINA NESSEN NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Eagle, Idaho
My Commission Expires: 5/13/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of August, 2008, a true and correct copy of the foregoing Affidavit of Scott Rose in Support of Summary Judgment was mailed by regular U.S. mail to Susan Patricia Weeks addressed, as follows:

Susan Patricia Weeks
Owens, James, Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:
2008 AUG -8 AM 11: 23
CLERK DISTRICT COURT
BY [signature]
DEPUTY

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702

(208) 342-2552 Telephone
(208) 342-3669 Fax
scott@idahoiplaw.com

Idaho State Bar #4197

Plaintiffs' Attorney

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District, an Idaho quasi-municipal corporation, Defendants.	CASE NO.: CV 04-8889 MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff, by and through its attorney of record, Scott Rose, and hereby Motions the Court pursuant to Rule 56 of the Idaho Rules of Civil Procedure for Summary Judgment.

Plaintiff's Opening Brief is filed herewith, along with the Affidavit of Scott Rose with exhibits attached in support of this Motion. This Motion is also based on the Court's file in this

matter in particular the Amended Verified Petition for Declaratory Relief and Injunctive Relief.

Plaintiff respectfully requests costs and attorney fees.

DATED this 8 day of August, 2008.

Scott Rose

By: _____
Plaintiff's Attorney, ISB# 4197

CERTIFICATE OF MAILING

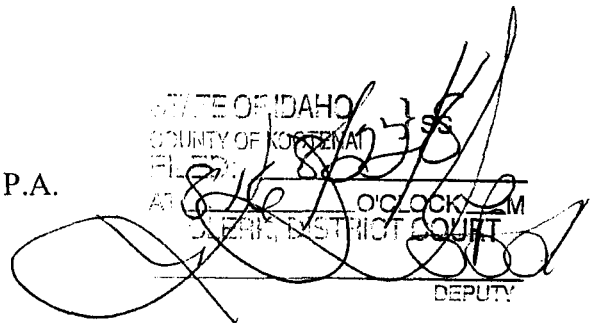
I HEREBY CERTIFY that on the 8 day of August, 2008, a true and correct copy of the foregoing Motion for Summary Judgment was mailed by regular U.S. mail to Susan Patricia Weeks addressed, as follows:

Susan Patricia Weeks
Attorney at Law
Owens, James, Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814

_____

SUSAN P. WEEKS
JAMES, VERNON & WEEKS, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
Facsimile: (208) 664-1684
ISB #4255

Attorney for Defendant



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District an Idaho quasi-municipal corporation. Defendant.	Case No. CV-04-8889 ORDER

The Court heard the motion from both parties for relief from the pretrial scheduling order on July 10, 2008. The Court being fully advised in the premises;

NOW THEREFORE IT IS HEREBY ORDERED that the parties are granted relief from the pretrial scheduling order and may file motions for summary judgment to be heard October 22, 2008 at 3:00 p.m.

DATED this 21st day of August, 2008.

JOHN P. LUSTER
District Judge

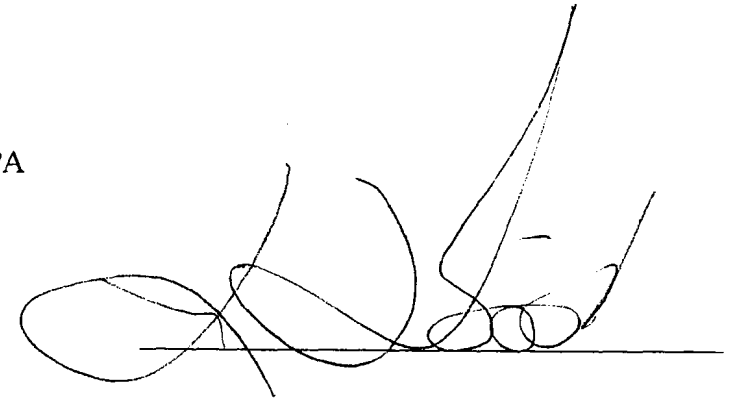
CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of August, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	U.S. Mail	☐	Overnight Mail
☐	Hand Delivered	☑	Telecopy (FAX)

SCOTT ROSE, ESQ.
300 Main Street, Ste. 153
Boise, ID 83702
Fax: (208) 345-1836

SUSAN P. WEEKS
JAMES, VERNON & WEEKS, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814
Fax: (208) 664-1684



STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 OCT -8 AM 11:35
CLERK DISTRICT COURT
DEPUTY

11:35 A.M.

SUSAN P. WEEKS
JAMES, VERNON & WEEKS, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
ISB #4255

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District, an Idaho quasi-municipal corporation, Defendant.	Case No. CV-04-8889 MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTON

Hayden Lake Irrigation District ("HLID") is an irrigation district generally located north of Prairie Avenue and West of U.S. 95. The Board of County commissioners received a petition for the formation of the HLID in 1913 and HLID was organized in 1914. At that time it acquired the water rights and the diversion and distribution system of the Interstate Irrigation Company, a

Washington corporation. It is not controverted that HLID is an irrigation district organized under the laws of this state. In addition to delivering irrigation water, HLID maintains a domestic water system.

Viking Construction is a residential builder. It has typically entered into a contract to buy lots from developers and offered 'home sales packages' on those properties wherein the buyer chose a lot and a floor plan design offered by Viking. Viking then constructed the home for an agreed amount of money. Viking Construction also builds speculation homes that it markets and sells.

As noted by Viking in its opening memorandum, Hayden Lake Irrigation District (HLID) has consistently charged a tap on fee for connection to its system. At its September 7, 2004 meeting, HLID reviewed the recommendations of a committee of members of the district and increased its residential connection fee by $500.

After the fee was increased, Viking Construction requested that HLID delay the fee increase. Viking Construction indicated it had pre-sold several home packages on a plat that was pending final approval, and the price of the package did not anticipate the increased connection fee. Viking Construction expressed the belief that the action of HLID in increasing the fee had inequitably cost it profit on the land package sales.

HLID collects the connection fee when new users connect to its system. A portion of the fee covers the actual cost of hooking into the system. However, the larger component of the fee is an equity buy-in fee charged to new member.

Viking Construction filed a declaratory judgment action and request for injunction against Hayden Lake Irrigation District on December 10, 2004. On March 31, 2008, the court allowed Viking Construction to file an amended petition. In its amended petition, Viking Construction sought to have the connection fees it was charged to hook up to the district's domestic water system declared illegal and refunded, or in the alternative, to have any increase in the fee to be declared null and void.

II. SUMMARY JUDGMENT STANDARDS

The law is well established in Idaho that on a motion for summary judgment, the trial court must determine whether the pleadings, deposition, and admissions, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56©; *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876,878 (1991). The burden of proving the absence of an issue of material fact rests at all times upon the moving party. *McCoy v. Lyons*, 120 Idaho 765, 769,820 P.2d 360,364 (1991); *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851,854 (1991).

In *J.R. Simplot Co. v. Bosen*, ___ Idaho ___, ___ P.3d ___ (S.Ct. Opinion 31706, 2006), the court set forth the requirement when the case is a court trial:

> "When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004). "The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.*

III. ARGUMENT

A. Character of Irrigation District

During discussion of this matter, the character of an irrigation district will become a topic of discussion. An irrigation district is purely a creature of statute. Idaho Code, Title 43.

Through the years, the court has struggled with the classification of an irrigation district. Irrigation districts have been characterized as various entities. Early on, it was described as not a "public service corporation" in the strict sense, but rather a mutual co-operative corporation organized not for profit but to distribute water to its members for use within the district. *Nampa & Meridian Irr. Dist. v. Briggs*, 27 Idaho 84, 147 P. 75 (1915). It has been held that they are, strictly speaking, not a "municipal corporation", but a "quasi-municipal corporation" operating its irrigation system in proprietary capacity, and any municipal powers thereof are only incidental. *Tingwall v. King Hill Irrig. Dist.*, 66 Idaho 76, 155 P.2d 605 (1915). It has been held that an "irrigation district," while exercising certain governmental powers, is brought into existence for private benefit of landowners within its limits; it owns and operates its irrigation system in a proprietary rather than public capacity, and assumes and must bear burdens of property ownership. *Eldridge v. Black Canyon Irr. Dist.*, 55 Idaho 443, 43 P.2d 1052 (1935). They have been characterized as a quasi public corporation for which no stock is issued. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951). The Supreme Court has also characterized an irrigation district as a unit and a legal entity holding title to its property and water rights in trust for uses and purposes set forth in its statutes. *Bradshaw v. Milner Low Lift Irr. Dist.*, 85 Idaho 528, 381 P.2d 440 (1963).

In *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 548 P.2d 80 (1976), the Supreme Court observed again wrestled with the characterization of an irrigation of an irrigation district and observed the following:

> In past decisions, this court has termed an irrigation district a 'quasi-municipal' corporation or a 'quasi-public' corporation. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951). *Tingwall v. King Hill Irrig. Dist.*, 66 Idaho 76, 155 P.2d 605 (1915); *Stephenson v. Pioneer Irrig. Dist.*, 49 Idaho 189, 288 P. 421 (1930). *See Barker v. Wagner*, 96 Idaho 214, 526 P.2d 174 (1974).

The Court then proceeded to determine whether an irrigation district was a public corporation for purposes of falling within the Idaho Tort Claims Act. The Court held it was not a public corporation for such purposes.

B. Connection Fees do not Violate Article VIII, Section 3 of the Idaho Constitution

In its memorandum in support of motion for summary judgment, Viking claims that the connection fee charged by violated Article VIII, §3 of the Idaho Constitution. This section provides:

> Article VIII. Public Indebtedness and Subsidies
>
> § 3. Limitations on county and municipal indebtedness
>
> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further that any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and, for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two-thirds of the

qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water system, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district.

The issue of whether this section applies to irrigation districts has been resolved by our Supreme Court. In *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 269 P.2d 755 (1954), the Supreme Court held that an irrigation district is not a municipality as referred to in this section of the constitution and this section of the constitution does not apply to an irrigation district. Thus, HLID is not in violation of this constitutional provision.

C. Connection Fees do not Violate Article XII, § 2 of the Idaho Constitution

Viking claims that HLID violated Article XII, § 2 of the Idaho constitution because the connection fee is unrelated to fee for regulation pursuant to this constitutional provision. This constitutional provision provides as follows:

Article XII. Corporations, Municipal
§ 2. Local police regulations authorized

Any county or incorporated city or town may make and enforce, within its limits,

> all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

The argument that fee increases require an ordinance pursuant to this constitutional provision was specifically rejected in *Snake River Homebuilders Ass'n v. City of Caldwell,* 101 Idaho 47, 607 P.2d 1321 (1980).

More importantly, this constitutional provision applies only to counties or incorporated cities or towns. By its terms, it does not apply to irrigation districts. Thus, the power of an irrigation district to impose connection fees is not derived from the constitution.

Viking also advances the argument that HLID has limited police powers to collect a connection fee pursuant to I.C. §§ 42-101, 42-220, 42-4201, and 42-3212. Viking avers to the fact that HLID did not pass an ordinance pursuant to any of these statutes, and that passing ordinances assure due process. Although it is not clear in Viking's memorandum, apparently Viking's argument is that HLID had to pass an ordinance in order to charge a connection fee. The statutes cited by Viking do not stand for this proposition.

Idaho Code § 42-101 merely provides that the state owns the waters of the state and is responsible for the appropriation and allotment of the waters. Idaho Code § 42-220 provides that once a license is granted the licensee has a right to use the water and the right is appurtenant to the land upon which beneficial use has been made. Idaho Code § 42-4201 gives the Director of Water Resources the right to grant licenses for ground water recharge in Lincoln, Gooding Jerome and Twin Falls counties. Finally, I.C. § 42-3212 applies to water and sewer districts, and discusses the general powers of the board. There is no related statute in the irrigation district portion of the code at Title 43.

Despite the significant differences between Title 42 and Title 43, Viking claims that HLID is controlled by *Potts Const. Co. v. North Kootenai Water Dist.*, 141 Idaho 678, 116 P.3d 8, Idaho (2005) based upon I.C. § 42-4201[1] (addressing issuance of an appropriation license for a pilot ground water recharge projects in southern Idaho) and I.C. § 42-3212 (general powers and duties of water and sewer districts). There is no similar provision in Title 43 addressing irrigation district's general power and duties and purpose. *Potts Const. Co. v. North Kootenai Water Dist., supra*, does not stand for the proposition that irrigation districts have police powers pursuant to the general powers and duties granted to it by the legislature.

Vikings also claims in this section of its memorandum that the collection of a connection fee violates the Development Impact Fee Act. It is unclear how this argument relates to the alleged violation of Article XII, § 2. Nonetheless, this argument is without merit. Idaho Code § 67-8203(9)(b) specifically excludes connection fees from this act.

D. The Irrigation District is Authorized by Statute to Charge a Connection Fee

Woven throughout Viking's memorandums are challenges to HLID's authority to charge a connection fee to new members. Rather than address these piecemeal, HLID will address them in this section of its response.

Viking contends that because HLID did not pass an ordinance that the connection fee is by default a tax. Viking cites to no authority to support this argument.

[1] Apparently there is a typing error in the Supreme Court's final opinion and the court intended to say to cite to I.C. § 42-3201 (purpose of water and sewer district is to promote health and welfare of members of district.)

Since 1914, the District's by-laws have provided for charging tap on (connection) fees to new users. The Board determined at that time that it was equitable to existing members to charge new members a connection fee for gaining the benefit and use of the existing system.

Addressing the issue of whether the Board has the statutory power to charge a connection fee, Idaho Code § 43-304 grants the Board the power to manage and conduct the business and affairs of the district, and to "to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same, which said by-laws, among other things, shall establish a fiscal year, and in case the by-laws do not provide for the establishment of a fiscal year, the fiscal year shall commence the first day of November and end the thirty-first day of October of each and every year. Said by-laws, rules and regulations must be printed in convenient form for distribution throughout the district." Clearly, this statute provided the had statutory authority to establish by-laws, rules and regulations which addressed new user connection charges as long as such by-laws were equitable and just among the owners.

The majority of Viking's argument focuses upon its contention that the connection fee must be a fee related to a regulation to be valid. In the present case, HLID is not collecting the connection fee pursuant to a police power regulation. Rather, it is collecting the fees under the statutory authority granted it with respect to the establishment of equitable by-laws and in the authority granted in the Irrigation District Domestic Water System Revenue Bond Act (Title 43, Chapter 19). This act has substantially identical provisions contained in the Idaho Bond

Revenue Act analyzed in *Loomis v. City of Hailey, supra*. As such, it is clear the connection fee is not a tax.

Viking asserts that the Board has no power to require a connection fee to its system because its power to collect revenues is limited by Title 43, Chapters 7 (which requires that the District establish an assessment to provide for operation and maintenance of the system); Title 43, Chapters 4 (which allows bonds to issue for the original construction and the rehabilitation of an existing system); and Chapter5, (which allow money to be raised by bonds).

Viking Construction claims that these provisions are the exclusive method under which the District can collect revenues. Nothing in Chapters 4, 5 or 7 indicates that an irrigation district is limited to collecting revenues only through assessments or bonds as argued by Viking. In fact, I.C. § 43-905 provides that an irrigation district can use tolls in combination with assessments to defraying the expenses of the district for the care, operation, management, repair and improvement of such portion of its system that are completed and in use (including salaries of officers and employees) at the time the toll is set, and that irrigation districts can require payment of the toll in advance of service.

It is undisputed that Hayden Lake Irrigation District has three contracts with the Bureau of Reclamation. It is further undisputed that its system includes a domestic water system With respect to domestic water, Title 43, Chapter 19 (Irrigation District Domestic Water System Revenue Bond Act) allows irrigation districts (including those that have contracted with the Bureau of Reclamation) to charge tolls and charges for expenses incurred in the construction, operation and maintenance of domestic systems, and to maintain such reserves as are reasonable

to assure continuous and efficient domestic water service; and to require the payment of such tolls and charges in advance of the delivery of water. *See* I.C. § 43-1903. These code sections disprove Viking Construction's position regarding the narrow construction of the Board's power to charge connection fees.

Further, the analysis provided in case law of similar provisions refutes Viking's argument. The powers of HLID granted pursuant to I.C. § 43-1909(e) are the same as those granted to municipalities pursuant to I.C. § 50-1030(f). The powers granted by the legislature pursuant to I.C. § 50-1030(f) were analyzed in the context of a municipality in *Loomis v. City of Hailey,* 119 Idaho 434, 807 P.2d 1272 (1991). Therein, the Supreme Court addressed many of the arguments raised by Viking in this matter.

The Supreme Court commenced its analysis in *Loomis v. City of Hailey, supra,* by disposing of the argument that a sewer connection fee was a tax. The Court noted that there was a difference between a municipality's exercise of its police powers and its proprietary functions. The Supreme Court recognized that when acting under the Idaho Revenue Bond Act (I.C. § 50-1027 – I.C. § 50-1042) that the city was exercising its proprietary functions. The Supreme Court held that a city derived its authority to charge water and sewer connection fees pursuant to the Idaho Revenue Bond Act and since the charge related to exercise of a proprietary function, the charge was not a tax. The court explicitly held that the Idaho Revenue Bond Act authorized the collection of sewer connection fees and as long as the fees were allocated and budgeted in conformity with that Act they would not be construed as taxes. The Supreme Court concluded that when the rates, fees and charges conformed to the statutory scheme set forth in the Idaho

Revenue Bond Act or were imposed pursuant to a valid police power, the charges were not construed as taxes.

The second prong of the *Loomis v. City of Hailey, supra,* case was an analysis of whether the fees collected pursuant to the Idaho Revenue Bond Act were allocated and budgeted in conformity with that Act. Viking makes several unsupported claims of facts in support of its summary judgment memorandum touching on this matter.

Viking points the court to the bylaws of the District, specifically Articles 5 and 8 the of Bylaws.[2] Viking claims that the connection fees is inequitable and a tax because it burdens a member twice under the bylaws and raises revenue for the same service twice. Article 5 provides that it is the District's responsibility to provide a connection to its water system for member and that it is the member's responsibility to pay for the costs to connect from the District's water meter to their point of application. Said in another way, HLID will not pay for the member's private lines from their residence to the water meter. This is a standard practice in all water systems. Article 8 addresses new domestic water users and provides that the member will be required to pay a tap-on fee plus reimburse the district its parts and labor to connect the new member to the system. For unclear reasons, Viking provides minutes from the year 2002 to the Court regarding a policy in 2002 wherein developers were installing their own meters and paying the costs for the meters directly. However, in deposition, HLID informed Viking's counsel that this policy was changed in 2003, and meter sets were subsequently done by district employees with district materials and the costs associated with this connection were being

[2] Although Viking does not give a record cite for these bylaws, they are located at Exhibit "A", pp. 74-79.

collected as a component of the connection fee. (*See* Rose, Exhibit E2, Rohrbach Vol. II, p. 70, ll. 21-25; p. 71, p. 72-73, p. 74, ll. 1-4.) Nothing in this set-up is a double charge or even a revenue to the district. The private line is the member's own property owned by the member and it generates no revenue to the District for the homeowner to pay for its installation. The payment for the meter set is a reimbursement of an expenditure by the District to provide a meter to connect a new member to the existing system. Thus, the fees charged pursuant to the bylaws are just and equitable in this respect.

Viking repeatedly claims that the connection fee is for future expansion of the system. There is no cite to any material in the record in support of this contention. Viking also claims in its memorandum that in 2004 with respect to assets acquired by HLID in 2004 that "[a]lmost half of that amount was paid for just with the Tapon Fees Plaintiff paid relative to the 65 homes ($175,500) immediately impacted by the overnight increase in September 2004." Again there is no cite to the record showing that Viking paid this amount of connection fees between September 8, 2004 and December 31, 2004, or even that the assets were acquired after that point in time. Indeed, the only information provided in the record is the deposition testimony of Cathy Meyer introduced by Viking. Consideration of Ms. Meyer's deposition testimony in context belies this allegation by Viking. In addition, her testimony reveals that the increase in HLID's assets in 2004 which Viking claims it funded were acquired by dedication of the assets by developers pursuant to development agreements.

Ms. Meyer's is not HLID's accountant as implied by Viking. Ms. Meyer's is an independent certified public accountant who has been engaged by HLID's Board of Directors to

audit the district's books to assure conformity with Government Accounting Standards Board (GASB) standards. The purpose of the audit is to provide reasonable assurance to the Board and the members that the financial statements of HLID are without material misrepresentation. (Rose Affidavit, Exhibit E, Meyer Deposition, p. 6, ll. 22-25, p. 7, ll. 1-11.)

In the course of her audits, in 2003, Ms. Meyers made a recommendation that the District set a capitalization policy. However, the term as she used it was unrelated to a connection fee policy. Rather, it related to when to book an asset and track depreciation. (Rose Affidavit, Exhibit E1, Meyer Deposition, p. 13-20.) Ms. Meyers clarified at deposition her use of the word "improvements" in her audit in her parlance was something that extended the life of an asset, but did not expand its breadth. Her example of an improvement was placing a new engine in a vehicle to extend its life. (Rose Affidavit, Exhibit E1, Meyer Deposition, p. 31, ll. 7-13.) In the rubric of *Loomis v. City of Hailey, supra*, this example would be a replacement of a system component.

Ms. Meyers testified that in 2002 the Board began setting aside the hookup fees in a separate account with the state treasurer net of the meter charge for water system improvements. (Rose Affidavit, Exhibit E1, Meyer Deposition, p. 40, ll. 1-14, p. 41, 1-17.) The name of the account where the connection fee was deposited as it showed on HLID's books was "1014 – State Treasurer's Invest Pool" to which hook-up fees were deposited net of meter sets. (Rose Aff., Exhibit E1, Meyer Deposition, Exhibit 12, 13, and 14). Prior to 2002, the hook up fees were placed in the general account but accounted for separately as a different revenue account labeled "capital fund". (Meyer deposition, p. 82, ll. 8-25, Exhibit 18.) These fees are utilized

specifically to maintain the existing infrastructure and keep it and viable, and not allow it to become defunct. The money was not used to purchase additional system assets to provide additional capacity. (Rose Aff. Ex. E2, Rohrbach Dep.Vol. I, pp. 86-87; p. 88, ll. 1-15.) The money has not been used to subsidize daily operations to avoid an increase in assessment rates for operation and maintenance. (Rose Aff. Ex. E3, Rohrbach Dep. Vol. II, p. 92, ll-24-25; p. 93, ll. 1-8.)

Viking claims in its memorandum that these connection fees were used to acquire a new well and expand the system. However, Ms. Meyer's testimony indicated that the well that was acquired by the District was exchanged to the District in lieu of payment of a dryland conversion fee owed to the District by a developer pursuant to a development agreement (Rose Affidavit, Exhibit E, Meyer Deposition, p. 43, ll. 15-25; p. 44, ll. 1-21.) Ms. Meyers also testified that the District had acquired significant infrastructure worth in excess of $100,000 pursuant to development agreements. However, she was clear there was no actual expense to the District related to these acquisitions because they were transfers to the District by developers pursuant to development agreements (Rose Affidavit, Exhibit E, Meyer Deposition, p. 45, ll. 11-25, p. 46, ll. 11-25, p. 47, ll. 1-11.) In 2004, there were capital contributions by developer's which increased the assets of the District. (Meyer Deposition, p. 80, l. 25, p. 26, ll. 1-5.)

The only planned expenditures of the connection fees testified to by Myers was replacement of existing water lines and the costs associated with installation of a SCADA system. (Meyer Deposition, p. 49, ll. 4-14.) Ms. Meyer's testified the District kept a separate bookkeeping record of the money spent from each of its revenue accounts, including hook-on

fees. (Meyer Deposition, p. 66, ll. 4-8.) Ms. Meyer's audit did not include in its scope a tracing the expenditure of connection fees to the item of cost. (Meyer Deposition, p. 72, ll. 7-14.) However, during her audits nothing came to her attention that indicated that operation fees were being paid with the connection fees. (Meyer Deposition p. 73, l. 20-25; p. 74, l. 1-9.) Contrary to Viking's unsupported position that the SCADA system was an expansion of the system, it replaced a failing system component of the existing water tower facility. (*See* Rose Affidavit, Exhibit A, p. 113)(advisory committee recommendation that Board acquire SCADA system to replace existing controller system on reservoir) and E3, Rohrbach Deposition, Vol. II, p. 51, ll. 20-25; p. 52, ll. 1-21 .) It added no capacity to the system and was not an expansion. The other planned expenditures from this fee were for replacing infrastructure that had reached its effective life. (Rose Aff. Ex. E3, p. 53, ll. 7-17.) The only other transfer of money from this system shown in the record is that HLID transferred an amount to reimburse the general fund for amounts expended for the meter sets. (Rose Aff. Ex. A p. 72.)

Viking also avers to a failed bond election and argues that the connection fees were really being collected to pay for the project that would have been financed by the bond failed bond election. Viking cites to the record regarding several meetings wherein the bond levy was discussed with members and members expressed certain individual concerns. However, Viking is incorrect that there was a failed bond election. The bond proposal was for a new water tower to provide additional fire flow volumes to the members of the district. After several public hearings and review by a member committee, the Board did not go forward with a bond election. (Rose Affidavit, Exhibit E2, Rohrbach Deposition, Vol I., p. 10, ll. 11-14.) In fact, a later

advisory committee recommended against considering the tower as an option for the district. (Rose Affidavit Exhibit A, p. 108.)

More importantly, the financing options for the tower that were discussed and considered were independent and unrelated to the hook-up fees charged by HLID as demonstrated by the rate committee recommendations to the Board in 2001. The committee recommended the Board seek a 1.5 million dollar bond levy in November 2001 for building the tower and if that failed, it recommended setting up a capital expenditure reserve fund dedicated to financing the tower funded by a rate increase to all users. Independent of the tower construction, the rate committee made a separate rate increase recommendation of domestic hook-up fees of $2,500 to bring the district's fees more in line with the equity buy-in of other local water districts. (Rose Exhibit "A", p. 41.) This money was not part of the recommended dedicated capital expenditure reserve for financing the tower.

As of the date of this suit, assessment rates had increased significantly. These rates have been used to pay for some of the improvements which had been contemplated in the 2001 bond levy unrelated to the tower. Other improvements still have not been performed. (Rose Ex. E3, Rohrbach Dep. Vol. II, p. 90, ll. 10-25; p. 91, ll. 1-22.)

Part of Viking's attack on the connection fee is that it allows the collection of money without a vote by the members on a bond. A similar argument was addressed and disposed of by the Supreme Court in *Loomis v. Hailey, supra.* Therein, the Supreme Court held that the Revenue Act allowed the use of revenues to provide for the expense of replacement and depreciation, including reserves for these purposes. Further, the Supreme Court observed that

the Revenue Act required that the system be self supporting. The Supreme Court held given these provisions that a bond election was not required to collect connection fees and to establish reserves for these purposes under the Act. These same provisions exist in the irrigation district Revenue Act. Thus, a bond election was not required for HLID to collect these fees and to hold them in reserve for the specified purposes.

Viking also argues that the $500 connection fee increase was not appropriately and reasonable determined. It cites to nothing in the record to support this contention. Viking claims the, "District simply pulled the Tap-on Fee amount out of thin air, arbitrarily." Viking complains that the connection fees are not applied solely to the benefit of the members paying the fee. Viking claims that Idaho law requires use of a formula to increase the connection fee. Regarding the reasonableness of the fee, in *Loomis v. Hailey,supra,* the Court discussed its previous holding in *Kootenai County Property Ass'n v. Kootenai County,* 115 Idaho 676, 769 P.2d 553 (1989), wherein property owners challenged the appropriateness of a flat fee rate imposed instead of a rate which reflected actual sewage use. The Supreme Court cited with approval its holding in that the legislature had not imposed exacting rate requirements upon localities and the law required only that the fee be reasonably related to the benefit conveyed. The Court noted it was not the province of this Court to determine how a municipality should allocate its fee and rate system. The Court further held so long as the fees and rates charged conformed to the statutory requirements and were reasonable, the fees, rates and charges would be upheld. The Court also held that the fees, rates and charges imposed by the municipality must be reasonable and produce

sufficient revenue to support the system at the lowest possible cost as required by the Idaho Revenue Bond Act.

In *Hailey v. Loomis,* the appellant made the same argument that the connection fee bore no reasonable relationship to the actual cost of hooking up to the system as Viking makes in this case. This argument was rejected. The Court specifically held that a connection fee may be imposed by the police power or other statutory power and would be upheld by the courts if it is not unreasonable and not arbitrarily imposed. The *Loomis* Court further clarified that merely because the charge represented something more than the actual cost of the actual physical hookup did not make the connection fee illegal.

Turning to the present case, the fees were not set arbitrarily. For approximately five decades, perhaps longer, the district has charged a hook-up fee for the equity buy-in of a member into the existing water system when the new member connected. (*See* Rose Affidavit, Exhibit "A", Rohrbach Dep. Vol. I, p. 30, 10-14.) In fact, the tap-on fee for domestic water use was first addressed in the 1947 Bylaw of the District. (Rose Affidavit, Exhibit "A", pp. 19-20, Section 11). This section provided for a tap-on fee for a new parcel created upon subdivision, provided for payment in addition to the tap-on fee of the actual additional expenses of making the connection, and provided that the member had to pay to improve infrastructure if necessary to serve the subdivided parcel.

The rate increase issue was addressed on more than one occasion by an advisory committees to the board. On March 4, 2002, the committee indicated in its minutes it needed more information researched before a rate increase could be addressed. (Rose Aff., Exhibit "A",

p. 65.) At the April 2, 2002 meeting, the Chairman of the rate committee, Virginia Balser, requested an operations and maintenance report from the District's engineer, JUB, for replacement of piping in connection with making a recommendation on a rate increase. (Rose Aff., Exhibit "A", p. 71.) This request reflects that the rate committee was assessing necessary reserves for the system to operate.

On August 17, 2004, the rate increase year which Viking raises in this suit, the Board tabled discussions of rate and connection fees to schedule a meeting of the advisory committee and conduct a director's workshop. (Rose Aff. Ex. A, p. 130.) The advisory committee met on September 1, 2007 and made recommendations.

At the Board's regular meeting on September 7, 2004, following a lengthy debate, the Board passed a $500 rate increase in the domestic connection fee. (Rose Aff. Ex. A, p. 138.) This fee included an equity buy-in component and a remuneration component to the district for the actual cost of the meter installed to connect to the system. (Rose Aff. Ex. E2, Rohrbach Dep. Vol. II, p. 28, ll. 1-20.) The board understood that equity buy-in was compensation for those devices, appurtenances, infrastructure, backbone, pumps, tanks and such items necessary to deliver water to the members that had been supported and maintained or kept operational by existing members for 50 plus years. (Rose Aff. Ex. E2, Rohrbach Dep. Vol. I, p. 71, l. 8-17.) Besides the advisory committee recommendation, the Board had reviewed the water management plan, it had the water master reports, and a series of control system failures. It had done analysis and had input from its engineer clarifying those parts of the water management plant that addressed antiquated, obsolete or marginally functional areas of the district. The

Board reviewed the general age and condition of the district's infrastructure. All of these factors were weighed in determining the amount of the required increase for reserves. (Rose Aff. Ex. E2, Rohrbach Dep. Vol. I, p. 80, ll. 8-25; pp. 81-82.

The same concept of buy-in as was used by the Board was utilized by the advisory committee. (Rose Aff. Ex. E2, Rohrbach Dep. Vol. I, p. 7, ll. 21-25; p. 72, l. 1.) Part of what the committee looked at in its meeting was the value of comparable systems in the area. (Rose Aff. Ex. A., pp. 133-134.) The committee had a worksheet from which it worked which reflected rates charged for equity by-in from comparable surrounding systems. Future growth of the district was not discussed as part of the fee increase. There were discussion of taking care of existing infrastructure and what maintenance or improvements might be necessary. The main topic of concern was to set a fee that reflected an equitable buy-in for new members to the system. (Rose Aff. Ex. E2, Rohrbach Dep. Vol. I, pp. 62, ll. 3-25, pp. 63-65, p. 66, ll. 1-22.) The committee used a comparative analysis, which included a comparison of surrounding water purveyors and what they were charging to buy into comparable systems. (Rose Aff. Ex. E2, Rohrbach dep. Vol. I, p. 68, ll. 3-8.) The committee also had HLID's water management plan which contained discussion about the current state of the infrastructure and the engineer's projected future needs and replacements for repairs. (Rose Aff. Ex. E2, Rohrbach Dep. Vol I, p. 75, ll. 12-24.) However, no engineer or accountant was engaged to calculate the equity buy-in. (Rose Aff. Ex. E2, Rohrbach dep. Vol. I, p. 69, ll. 16-25.)

Viking claims that the above process used by HLID in its decision making is unreasonable and arbitrary. Viking contends that a rate increase can not occur without an

engineer's study. Our courts do not require such exactitude. The method used by HLID demonstrates that equality of treatment of all members was the main concern of the Board. The above discussion demonstrates that the Board did not randomly choose a number but rather utilized a methodology that included study and use of figures and analysis of its system. HLID considered the value of the existing system, the cost to purchase equity into comparable local water distribution systems, the water management plan of the district and its engineer's analysis of system needs for repair and replacement.

In *Potts Const. Co. v. North Kootenai Water Dist.*, 141 Idaho 678, 116 P.3d 8 (2005), the *Potts* court recognized that the burden falls on the challenging party to demonstrate that the fee is either in conflict with the general laws of the state, unreasonable or arbitrary. It also recognized that whether or not an ordinance is unreasonable or arbitrary is a question of law. The *Potts* court also noted that generally courts are not concerned with the wisdom of ordinances and will uphold a municipal ordinance unless it is clearly unreasonable or arbitrary. Although the present case concerns statutory authority granted to HLID, the same standards should apply. Viking has made no showing that the connection fee prior to the $500 increase was unreasonable or arbitrary. The record is replete with evidence that the District has consistently charged this connection fee and has regularly adjusted the fee after review and analysis. Further, Viking has not demonstrated that the fee increase in September 2004 was unreasonable or arbitrary. To the contrary, HLID has demonstrated through Viking's own submissions to the record that it acted reasonably and its decision was based upon valid considerations and figures, even though they were not generated by an engineer in a report.

E. The Connection Fee does not Violate Art. VII, § 6, Idaho Constitution

Viking claims the connection fee violates Article VII, § 6 of the Idaho Constitution. This clause provides: "The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation." Viking provides no substantive argument on how it is alleged that the legislature has imposed a tax for the benefit of HLID. First, HLID is not a municipality. Second, the legislature has not imposed a tax for its benefit.

In support of this contention, Viking cites the court to *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995) wherein the court held that police power regulations enacted for the furtherance of the public health, safety or morals or welfare of its residents and related fees authorized pursuant to these regulations primarily for the purpose of raising revenue is in essence a tax and can only be upheld under the power of taxation.

As discussed previously, in this case, the connection fee is not claimed to relate to regulation as was the case in to *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*. It was not passed for the health, safety, morals or welfare of the members of the district. Rather, it was established by by-law as a just and equitable means to provide for new members buying into the existing system and is a fee authorized by the Bond Revenue Act. In this context, *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933) recognized that an irrigation district is acting in a proprietary manner and not exercising the secondary and incidental municipal powers that it may have been granted. Thus, the analysis provided in *Idaho*

Bldg. Contractors Ass'n v. City of Coeur d'Alene, supra, is not useful. The connection fee is a fee authorized by statute as was the case in *Loomis v. City of Hailey, supra.*

Viking also argues in this section of its memorandum that the federal and state laws prohibit the district from having a "slush" fund for unknown future expenditures. However, as presented previously and discussed thoroughly above, state law not only allows an irrigation district operating a domestic water system to have reserves, it requires it to provide for a reserve. I.C. § 43-1903.

Viking also argues that I.C. § 43-401 prohibits a reserve. Nothing in I.C. § 43-401 prohibits a reserve. This argument runs contrary to the express provision of I.C. § 43-1903 and I.C. § 43-1911, which require the district to keep the domestic water system self supporting and to set rates from time to achieve this objective, together with reserves. A similar argument was made and rejected by in *Loomis v. Hailey, supra,* wherein the *Loomis* court noted that nothing in the Bond Revenue Act statutes required that the electors approve all changes to the rates, fees, or charges used to finance public works projects. The same is true of the irrigation district's Bond Revenue Act.

F. The Fee does not Violate Art. VII, §§ 5 and 2, Idaho Constitution

Viking alleges the connection fee is not imposed ratably or proportionately set and therefore violates the above provisions of the Idaho constitution. Irrigation district annual assessments (Title 43, Chapter 7) are not taxes pursuant to these provisions of the constitution. *Brown v. Shupe,* 40 Idaho 252, 233 P. 59 (1924). Connection fees collected pursuant to the statutory provisions of the Bond Revenue Act are not taxes. *Loomis v. Hailey, supra.*

Viking cites to *Little v. Nampa-Meridian Irrigation District,* 82 Idaho 167, 350 P.2d 740 (1960) in support of this contention. However, an analysis of the facts and holding of this case shed little light on the matter before this court. The *Little* case involved the proper method and basis for assessing annual operation and maintenance costs pursuant to Title 43, Chapter 7 to similarly situated members of the District. It did not address any fees collected pursuant to the Bond Revenue Act, Title 43, Chapter 19. Using this case authority is like comparing apples to oranges. The fact that the *Little* court concluded that annual assessments for operation and maintenance had to be uniform between similarly situated members does not aid the court in this matter. The case which provides the best guidance is *Loomis v. Hailey, supra,* discussing the similar provisions of another Bond Revenue Act as applied to municipal corporations. Under the holding of *Loomis,* it is clear that charging a connection fee pursuant to the Revenue Act will not be deemed a constitutional violation per se because it relates to the proprietary functions of the district.

Viking cites to *Gedney v. Snake River Irr. District,* 61 Idaho 605, 104 P.2d 909 (1940) in its memorandum for the proposition that the Supreme Court analyzed Title 43, Chapter 19 ad held that all tolls must be proportional. These statutory provisions were not a topic of discussion in the case. Rather, assessments for operation and maintenance of the irrigation system portion of the district was discussed and it was held that different assessments for maintenance and operation could not be charged to members even though the cost of transmission to some lands might be more expensive than others because all properties received the same benefit. This holding does not guide or assist the court in the present case, which does not concern

disproportionate operation and maintenance assessments. Rather, this case involves whether it is just and equitable to charge a connection fee to new members connecting to HLID's domestic water system , and the parameters of this connection fee as authorized by Title 43, Chapter 19.

G. The Connection Fee doES not Violate Article XV, §§ 2, 4 or 5 of the Idaho Constitution.

Viking claims the connection fee interferes with its constitutional rights pursuant to the above provisions of the Idaho constitution to access water rights held in trust for the members of the district. In support of its position, Viking cites *Adams v. Twin Falls-Oakley Land & Water Co.*, 29 Idaho 3547, 161 P. 322 (1916). This case involved the homestead rights of an entryman paying for authorized construction charges pursuant to the Carey Act. The defendant was a construction company which was deemed an operating company. It was not an irrigation district. The case involved the court's construction of a contract clause which provided that am entryman purchaser was not entitled to water from the operating company if he was in default under the payment terms of a contract for construction of irrigation facilities. The purchaser entryman claimed the contract clause was void as against public policy reasons and contrary to the entryman statutes. The *Adams* court held that the entryman statutes limited the construction company's remedy in the event of default to filing a lien against the real property and foreclosing on it. The case was specific to the rights of a settler of lands under the Carey Act. It can't be extended to stand for the proposition that any of the provisions of Title 43, Chapter 19 are unconstitutional.

In the present case, the new members who wish to connect to the District's systems are not settlors of land under the Carey Act nor are they existing members who have paid their annual assessment. This case simply does not stand for the proposition which Viking contends it does that that there is a statutory duty for an irrigation district to supply domestic water under the Carey Act to a new member if rentals and tolls (i.e. the assessment) is paid irregardless of whether the new member pays the required connection fee under the Bond Revenue Act. In fact, I.C. § 43-1903 allows for HLID to require payment of the connection fee in advance of delivery of water.

Viking also cites the court to the provisions of I.C. § 42-220 for the proposition that an irrigation district does not have authority to charge a connection fee. This code section applies to the rights of licensees vis a vis the state. It does not define the rights and obligations of a member of an irrigation district.

Viking also tries to characterize the requirement of paying a connection fee as a condition to receiving service as being the equivalent of the denying a new member in the district with his priority rights to the water. No case law is cited in support of this position. In fact, there is no case law that holds that a new member in an irrigation district who wishes to add a connection to the domestic water system is unconditionally entitled to the delivery of water without payment of the fees and charges authorized by Title 43, Chapter 19.

H. The By-Laws are Valid

Viking Construction contends that even if the Board had the statutory power to establish connection fees that the by-laws are illegal because members did not authorize the by-law

changes. Idaho Code § 43-304 allows the directors of an irrigation district to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of land in the district. The only requirements that members vote on a by-law appears in I.C. § 43-111, which allows a 2/3 vote of the members to pass a by-law altering the code requirement that a voter live within the district to allow a voter to live within 15 miles of the district in order to be eligible to vote and I.C. § 43-201, which allows a 2/3 vote by members to pass a by-law altering the code requirement that a director live within the district to allow a director to serve if they live within 15 miles of the district. These are the only by-laws that the legislature expressly requires that the members vote upon. All other by-laws by statute are established by the Board with the only requirement being that they be equitable. I.C. § 43-304.

Nonetheless, Viking claims that I.C. § 42-2401 required a vote by the members to approve the by-law changes occurring from 1947 forward. This code section applies to operating companies with stockholders. It does not apply to irrigation districts. Thus, its terms do not control in this matter. Rather, the statutes set forth above are controlling.

Viking also claims that its due process rights were violated by a fee increase. Viking asserts: "The District arbitrarily deprived Plaintiff of its constitutional rights failing to provide procedural safeguards of notice and an opportunity to be heard." Viking identifies no *constitutionally protected right of which it was deprived.* The setting of rates and fees does not deprive any member of their right to receive water from the District.

I. The Connection Fee doES not Violate the terms of the Contracts with the Bureau of Reclamation.

Viking claims the District is prohibited from charging connection fees to its domestic water system by the terms of its four contracts with the Bureau of Reclamation. First, Viking claims that the Bureau holds title to HLID's entire irrigation system. This claim simply is not true. Viking's own facts recited in its memorandum prove the falsity of this claim. The last contract with the bureau was entered into in 1977. The wells, which are the sole source of water to HLID, were put in place in the 1980's when it was determined that Hayden Lake was no longer a viable source for domestic water. Thus, the main source of water for HLID is not owned by the Bureau and not addressed in the Bureau contracts. Further, all infrastructure that has been added, which has been significant in recent years as reflected in the audits attached to the Rose affidavit, is not owned by the Bureau. Significant portions of the District's system are not encumbered by the Bureau contract.

Further, Viking's analysis of the contracts is flawed. The Bureau contracts allow for reserves for the system. They do not limit the District with respect to the domestic water system. The limitations contained in the contract relate to the collection of the bond assessment and operation and maintenance assessments for irrigation waters, which are separate from connection fees to maintain the domestic water system.

J. The Judicial Confirmation Process is not Available for Advisory Opinions

Viking requests attorney fees arguing that HLID should have had its authority to charge connection fees predetermined by a court pursuant to I.C. § 7-1301, et. seq. These provisions of Idaho law are for a court to determine if a governing body of a political subdivision has authority to issue bonds. It is not an avenue for an advisory opinion on interpretation of irrigation district

law. As to the remaining arguments raised by Viking for attorney fees, such a discussion is premature pending this Court's decision.

K. Conclusion

The actions taken by HLID's Board in this matter were authorized by statute and not in excess of its authority. The fee charged was reasonable. It was arrived at th rough a reasonable exercise of judgment. Therefore, the Court should deny Viking's motion for summary judgment and dismiss its case.

DATED this 8th day of October, 2008.

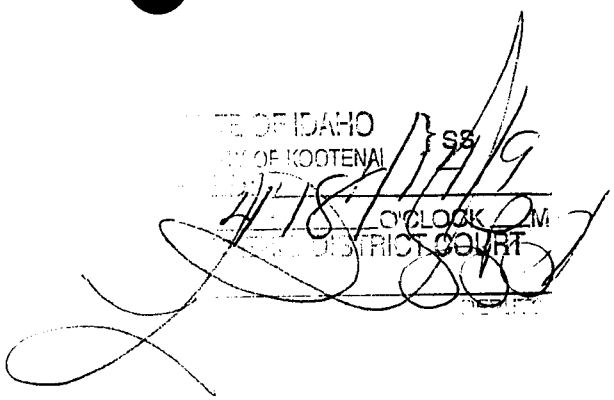
By Susan P. Weeks
SUSAN P. WEEKS
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8TH day of October, 2008 I served true and correct copies of the foregoing document by facsimile and e-mail upon the following:

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702
(208) 342-3669 Fax
scott@idahoiplaw.com

Lori Rawson



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VIKING CONSTRUCTION, INC., an Idaho Corporation, Plaintiff, vs. HAYDEN LAKE IRRIGATION DISTRICT, an Idaho Quasi-Municipal Corporation, Defendant.	**CASE NO. CV-04-08889** MEMORANDUM OPINION AND ORDER IN RE: MOTION FOR SUMMARY JUDGMENT

Plaintiff seeks a determination regarding payments charged by Defendant when a consumer or user of water for a newly built house desires access to water. Plaintiff moved for Summary Judgment.

Scott Rose, attorney for Plaintiff.

Susan P. Weeks, JAMES, VERNON & WEEKS, attorneys for Defendant.

The Plaintiff, Viking Construction, Inc., ("Viking") filed a Petition for Declaratory Relief and Injunctive Relief against the Defendant, Hayden Lake Irrigation District ("HLID"). Viking seeks the following determinations:

(1) Whether or not the Charge imposed by HLID is permissible or not permissible;

(2) Whether or not the increase in the amount of the Charge imposed by HLID is permissible or not permissible; and

(3) Whether or not the immediate implementation of the increase in the amount of the Charge imposed by HLID is permissible or not permissible.

Viking contends that (1) the payments do not pay for any type of physical connection; (2) the payments are neither a fee nor are they regulatory in nature; and (3) HLID has not invoked its police powers to the extent it has police powers by passage of an ordinance permitting the charges. Viking claims that the charges are without statutory authority and in violation of Viking's due process and equal protection rights. Viking alleges that the charges are nothing more than a disguised unconstitutional tax.

I

FACTUAL AND PROCEDURAL BACKGROUND

The Hayden Lake Irrigation District is an irrigation district generally located north of Prairie Avenue and West of U.S. 95. In addition to delivering irrigation water, HLID maintains a domestic water system.

There is a lengthy history behind the Hayden Lake Irrigation District.[1] HLID's predecessor was Interstate Irrigation District, a privately owned Washington corporation. Initially, Interstate Irrigation District platted the Hayden Lake Irrigation Tracts on July 29, 1910. The Kootenai County Board of County Commissioners received a petition for the formation of the Hayden Lake Irrigation District in 1913. In 1914, HLID was formed pursuant to the Carey Act and the Reclamation Act of 1902 and pursuant to Idaho law. At the time of its formation, HLID acquired the water rights and the diversion and

[1] The history has been extensively covered in the briefing and supporting affidavits. Likewise, the parties have set forth in detail the development of the events leading up to this lawsuit.

distribution system of the Interstate Irrigation Company. HLID is considered to be a quasi-municipal corporation.[2]

Viking Construction, Inc., is a construction company that builds custom and speculation homes. Viking previously owned and currently owns multiple parcels of land located within the Hayden Lake Irrigation District and within the City of Hayden, Idaho. In order to obtain a building permit from the City of Hayden, Viking must show that it has paid the fees or charges imposed by HLID. These payments or fees, which have consistently been charged over many years, have been referred to by different terms such as "tap-on fees," "hook up fees," or "connection fees;" they will also be referred to here as "charges" or "payments."

At a regular meeting on September 7, 2004, HLID amended and raised its charges.[3] The increase was implemented the following day. The domestic charge increased from $2200 per house to $2700 per house.[4]

Before the charges were raised, HLID did not hold an election to obtain ratepayer approval. HLID did not pass an authorizing ordinance prior to the increase.

Prior to the meeting, Viking had pre-sold sixty-five (65) houses for delivery after September 8, 2004, on a plat that was pending final approval. The contract price for those homes was based on the $2200 charge and did not anticipate the increased charges. Viking requested that HLID delay the increase. HLID refused to provide water without receiving the payment of $2700 per home.

---

[2] In the argument section of its briefing, HLID notes that the appellate courts have struggled with the classification of irrigation districts and characterized them in different ways. However, it appears that the parties, including Plaintiff, acknowledge that irrigation districts have been termed "quasi-municipal" corporations. ***Brizendine v. Nampa Meridian Irrigation District***, 97 Idaho 580, 548 P.2d 80 (1976).

[3] A committee of members of the district studied the matter and recommended that residential connection fees be raised by $500.00.

[4] At the same time, the charges were increased on commercial properties as well.

HLID collects these payments when new users connect to its system. A portion of the payment covers the actual cost of hooking into the system. However, according to HLID, the larger portion of the payment is an equity buy-in charged to new members. The primary method for HLID to obtain cash reserves is through the equity buy-in charge.

Viking filed a declaratory judgment action and sought injunctive relief against HLID.[5] Subsequently, Viking filed a Motion for Summary Judgment. Viking seeks summary judgment as a matter of law that the charges are (1) unconstitutional; (2) violate Idaho and Federal statutory law; and (3) breach contracts between the Irrigation District and the United States. Viking seeks injunctive relief and damages. The Irrigation District opposes the Motion. The parties have filed affidavits and submitted briefing.

II

STANDARDS FOR SUMMARY JUDGMENT

Rule 56, Idaho Rules of Civil Procedure, provides for summary judgment where there is no genuine issue and the moving party is entitled to judgment as a matter of law. In order to make that determination, the court must look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . ."

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. If the court will be the ultimate trier of fact and if there are no disputed evidentiary facts, the judge is not constrained to draw inferences in favor of the party opposing the motion for summary judgment; rather, the trial judge is free to arrive at the most probable inferences to be drawn from

[5] The operative pleading is now the First Amended Complaint.

uncontroverted evidentiary facts. ***Bonz v. Sudweeks***, 119 Idaho 539, 808 P.2d 876 (1991); ***Loomis v. City of Hailey***, 119 Idaho 434, 807 P.2d 1272 (1991).

If there are no genuine issues of material fact, the court will determine whether a party is entitled to judgment as a matter of law. ***Zumwalt v. Stephan, Balleisen & Slavin***, 113 Idaho 822, 748 P.2d 405 (Ct.App. 1987), ***rev. denied*** (1988).

III

DISCUSSION

A. Alleged Violations of Constitutional Provisions

Viking contends that HLID has violated several Constitutional provisions, particularly provisions of the Idaho Constitution. HLID denies that it violated any of the Constitutional provisions. The Constitutional provisions have been extensively briefed.

1. Section 3 of Article VIII of the Idaho Constitution

The Constitution of the State of Idaho, Art. VIII, § 3, sets forth limitations on county and municipal indebtedness. Before incurring indebtedness exceeding the income and revenue in the year in which the indebtedness is incurred, local governments must (1) hold a public election securing two-thirds (2/3) of the vote; and (2) collect an annual tax sufficient to pay the debt within thirty (30) years. ***See City of Boise v. Frazier***, 143 Idaho 1, 137 P.3d 388 (2006).

Viking argues that the provision bars an irrigation district from incurring an indebtedness without elector approval for a proposed expenditure exceeding the income and revenue in the year in which the district incurs the indebtedness. According to Viking, HLID violates this provision because the money is being collected for financing

of capital improvement projects. Viking contends that HLID must obtain approval from the voters.

However, the issue of whether or not this section applies to irrigation districts was resolved by the Idaho Supreme Court in ***Jensen v. Boise-Kuna Irrigation District***, 75 Idaho 133, 269 P.2d 755 (1954). In ***Jensen***, the Idaho Supreme Court held that an "irrigation district is not a municipality such as referred to in this section . . . ." ***Jensen v. Boise-Kuna Irrigation District,*** 75 Idaho at 142, 269 P.2d 761. Thus, under ***Jensen***, the requirements of Idaho Constitution, Article VIII, § 3, do not apply to HLID. This provision does not apply to HLID and does not prohibit HLID from taking action. Viking's Motion for Summary Judgment cannot be granted.

2. Section 2 of Article XII of the Idaho Constitution

Article XII, § 2, of the Idaho Constitution addresses municipal corporations. Any "county or incorporated city or town may make and enforce, within its limits all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws."

Under this constitutional provision, a municipality may provide for collection of revenue incidental to enforcement of a regulation enacted under a municipality's police powers. However, that revenue must be distinguished from a fee or charge imposed by a municipality primarily for revenue raising purposes. In the latter case, it is a "tax" and can only be upheld under the power of taxation, which requires a specific legislative enactment such as an ordinance. ***See Idaho Building Contractors Association v. City of Coeur d'Alene***, 126 Idaho 740, 890 P.2d 326 (1995) (an impact fee was not a police

power regulation; it was a tax that was purely a revenue raising assessment so it was not permissible without specific legislative enactment).

Thus, a municipality may collect fees considered incidental to regulations; taxes require specific legislative authorization. A "fee" is a charge for a direct public service rendered to the particular customer while a "tax" is a forced contribution by the public at large to meet public needs. In addition to having a regulatory purpose, a "fee" must be reasonably and rationally related to the regulatory purpose. A municipality cannot, in the exercise of its police powers, levy taxes. ***See Potts Construction Co. v. North Kootenai Water District***, 141 Idaho 678, 116 P.3d 8 (2004); ***Foster's Inc. v. City of Boise***, 63 Idaho 201, 118 P.2d 721 (1941).

In this case, it appears that Viking is claiming that HLID had to pass an ordinance, which would ensure due process, in order to charge a connection fee or increase that fee. Viking claims that HLID had limited police powers to collect a connection fee.

HLID makes the following arguments. First, with regard to any fee increase, HLID argues that this Constitutional provision does not require that an ordinance be passed before fees can be increased. The proposition that fee increases require an ordinance under this constitutional provision was expressly rejected in ***Snake River Homebuilders Ass'n v. City of Caldwell***, 101 Idaho 47, 607 P.2d 1321 (1980) (holding that a city may adopt an increase in the rate charged for extending its water mains by resolution rather than by ordinance).

Second, HLID argues that this particular constitutional provision applies to counties or incorporated cities or towns. By its terms, it does not apply to irrigation

districts. According to HLID, the power of an irrigation district to impose connection fees is not derived from the Constitution.

Third, HLID argues that the statutes cited by Viking in its briefing as limiting the police powers to collect a connection fee simply do not apply. Viking is citing to statutes found in Title 42 of the Idaho Code. There are no related statutes in the irrigation portion of Title 43.[6]

Upon review, a distinction must be drawn between two particular concepts: (1) the difference between fees for direct services rendered to customers incidental to regulations and "taxes" or fees collected for revenue raising purposes which require the enactment of an ordinance; and (2) the difference between sewer and water districts as opposed to irrigation districts which are organized and exist under different titles in the Idaho Code.

To the extent that HLID imposed an otherwise valid rate increase, Art. XII, § 2, of the Idaho Constitution did not require HLID to pass a specific ordinance in order to increase the rate. Upon examination of the Constitutional provision and cases referring to it, this particular provision has been applied to counties and incorporated cities or towns. With regard to whether or not this is a fee for a direct service or a tax, that issue will be addressed in more detail in Section B below.

The action taken by HLID to increase the connection charge does not violate Art. XII, § 2, of the Idaho Constitution. Therefore, Viking's Motion for Summary Judgment cannot be granted on this ground.

[6] Title 42 addresses "Irrigation and Drainage – Water Rights and Reclamation." Chapter 32 of Title 42 addresses the formation of "Water and Sewer Districts." Title 43 addresses "Irrigation Districts." Since HLID is an irrigation district, it is governed by Title 43 rather than Title 42.

3. Section 6 of Article VII of the Idaho Constitution

Article VII of the Idaho Constitution addresses "Finance and Revenue." Idaho Const., Art. VII, § 6, allows "Municipal corporations to impose their own taxes." The provision reads as follows: "The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation."

For purposes of this provision, assessments by irrigation districts are authorized; an irrigation district is a municipal corporation within the meaning of this section. ***Oregon S.L.R.R. v. Pioneer Irrigation Dist.***, 16 Idaho 578, 102 P. 904 (1909).

Under this provision, the legislature does not impose "taxes" on an irrigation district. Rather, the legislature may empower the irrigation district to collect taxes.

The focus again shifts to whether or not HLID was imposing a "tax" upon Viking. HLID contends that it was acting pursuant to statutory authority and not in pursuit of a regulation or under the police power. A conclusion here depends upon a determination with regard to the classification of the charge. If the collection is determined to be pursuant to statutory authority, the connection fee does not violate this Constitutional provision. If that is the case, Viking's Motion for Summary Judgment must be denied. ***See*** the determination regarding classification in Section B below.

4. Sections 5 and 2 of Article VII of the Idaho Constitution

As noted above, Article VII of the Idaho Constitution addresses "Finance and Revenue." Section 2 deals with "Revenue to be provided by taxation." Section 5 deals

with "Taxes to be uniform – Exemptions." Both of these sections apply in situations involving taxes.

Viking claims that the connection charge is not imposed uniformly or set proportionately. Therefore, according to Viking, the charge violates the Constitutional provisions.

HLID contends that its annual assessments, which are enacted pursuant to Title 43, Chapter 7 of the Idaho Code, are not taxes that are governed by these Constitutional provisions. ***Brown v. Shupe***, 40 Idaho 252, 233 P. 59 (1924). Furthermore, HLID contends that connection fees collected pursuant to the statutory provisions of the Bond Revenue Act, which is found in Title 43, Chapter 19 of the Idaho Code, are not taxes.

If the charge is found to be pursuant to statutory authority, it is not a tax. In that event, these Constitutional provisions would not apply and Viking's Motion for Summary Judgment on this ground would be denied. ***See*** the decision in Section B below.

5. <u>Sections 2, 4, and 5 of Article XV of the Idaho Constitution</u>

Article XV of the Idaho Constitution addresses "Water Rights." Section 2 deals with the "Right to collect rates a franchise." Section 4 deals with "Continuing rights to water guaranteed." Section 5 deals with "Priorities and limitations on use." These sections apply to irrigation districts. ***Bradshaw v. Milner Low Lift Irrigation District***, 85 Idaho 528, 381 P.2d 440 (1963); ***Yaden v. Gem Irrigation District***, 37 Idaho 300, 216 P. 250 (1923).

Upon review, it is determined that, under the specific facts of this case, these sections do not apply to make HLID's actions unconstitutional. Therefore, Viking's Motion for Summary Judgment based upon this ground must be denied.

B. Classification of the Charges as a Regulatory Fee, a Tax, or Statutory

The issue presented in this case is whether the connection fee imposed upon Viking by HLID should be classified as: (1) revenue collected incidental to regulations as fees for direct public service; (2) revenue raised as a tax, which requires specific legislative approval and authority; or (3) a charge imposed pursuant to statutory authority. On the one hand, Viking contends that the charges must constitute either a regulatory fee for a direct public service or a tax; if they are taxes, the passage of an ordinance was required in order for the charges to be valid. Without such an ordinance, Viking argues that the charge would be invalid. On the other hand, HLID claims that the connection fees were imposed pursuant to statutory authority, which makes them valid charges; the statutes provide authority for HLID to establish its By-laws and thereafter impose connection fees.

It is undisputed that, at the time that the charges were imposed in September of 2004, HLID did not attempt to or pass an authorizing ordinance which would provide for collection of the charges. The question is whether or not such an ordinance was required. Thus, a determination must be made as to whether the charges were "regulatory," whether they were a "tax," or whether they were enacted pursuant to enabling statutes.[7]

Viking contends that the connection fee is not a regulatory fee for a public service direct to the customer. According to Viking, all of the direct costs involved in connecting are paid by others.[8] Viking argues that, therefore, the connection fee is a revenue

[7] In this case, Viking appears to be challenging both the initial connection charges and the increase in the connection charges. However, the two are interrelated. If the connection charges are not taxes, then the increase will not be considered as a tax either.

[8] ***But see*** the discussion regarding payments for actual costs on p. 15, ***infra***.

generating tax. Since HLID did not pass an ordinance, Viking claims that the connection fee as a tax is invalid.

HLID takes the position that it is authorized by statute to charge a connection fee, which in this case has been called a Tap-on Fee. ***Title 43 of the Idaho Code*** addresses "Irrigation Districts." Chapter 3 of Title 43 addresses the "Powers and Duties of Board of Directors" of an irrigation district. ***Idaho Code § 43-304*** grants the board the power to manage and conduct the business of the district. According to ***Idaho Code § 43-304***,

> Said board shall have the power to manage and conduct the business and affairs of the district, make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required and prescribe their duties, to ***establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same*** . . . ."

HLID argues that this statute provides statutory authority for its Board to establish by-laws, rules, and regulations which address new user connection charges so long as such by-laws are equitable and just among the owners.

The By-laws for HLID provide for charging a connection fee to new users and have done so for many years.[9] The Board determined that it was equitable to existing members to charge new members a connection fee for gaining the use of the existing system.

The conclusion here is that the connection fee can be imposed pursuant to the statutory authority granted to it to establish equitable by-laws.[10] In this case, the connection fee imposed by HLID was not a tax that required the enactment of a specific

[9] HLID claims that the By-laws have provided for charging a connection fee to hew users since 1914. The By-laws have been amended on several occasions. For example, the 1947 Amended By-laws adopted certain Tap-on Fees. The present Amended By-laws were adopted on May 7, 2002.

[10] HLID also relies upon authority granted in the Irrigation District Domestic Water System Revenue Bond Act, which is found in Title 43, Chapter 19.

ordinance. It was a valid charge imposed pursuant to statutory authority and the duly enacted By-laws.

Viking claims that, even if HLID could collect a connection fee pursuant to statutory authority, its power to collect revenues is limited by Chapters 4, 5, and 7 of Title 43 of the Idaho Code.[11] However, those chapters are not the only methods under which irrigation districts can collect revenues.

HLID has three contracts with the Bureau of Reclamation. HLID has a domestic water system. Chapter 19 of Title 43 of the Idaho Code, which is the "Irrigation District Domestic Water System Act," allows irrigation districts, including those who have contracted with the Bureau of Reclamation, to impose tolls and charges for expenses incurred in the construction, operation, and maintenance of domestic systems. Irrigation districts can maintain reserves and can also require the payment of such tolls and charges in advance of the delivery of water. ***See Idaho Code § 43-1901, et seq.***

HLID relies upon authority granted in Idaho Code § 43-1909(e), which is part of the Irrigation District Domestic Water System Revenue Bond Act. The statute sets forth certain powers for irrigation districts, including to "prescribe and collect rates, fees, tolls or charges . . . for the services, facilities and commodities furnished by works . . . ."

The case of ***Loomis v. City of Hailey***, 119 Idaho 434, 807 P.2d 1272 (1991), is persuasive here. Although that case involved a municipality rather than an irrigation district,[12] the powers of an irrigation district under ***Idaho Code § 43-1909(e)*** are the same

[11] Chapter 4 of Title 43 is titled "Bonds- Issuance, Confirmation and Sale;" it allows bonds to issue for the original construction and the rehabilitation of an existing system. Chapter 5 of Title 43 is titled "Secondary Bonds to Pay Interest;" it allows money for interest to be raised by the sale of coupon bonds. Chapter 7 of Title 43 is titled "Levy and Collection of Assessments;" it allows for and governs assessments by irrigation districts.

[12] In ***Loomis***, the City of Hailey adopted an ordinance providing for new water and sewer connection fees. Loomis and Grubbs, who were residents of Hailey, challenged the constitutionality of the ordinance and the

as those granted to municipalities under ***Idaho Code § 50-1030(f)***, which is part of the Idaho Revenue Bond Act. In ***Loomis***, city residents challenged the reasonableness of the city's equity buy-in method of determining water and sewer connection fees as well as the collection and use of those fees for replacement of system components as an unauthorized revenue raising method. ***Loomis*** sets forth a two step process: (1) a determination must be made as to whether the connection fee constitutes an impermissible tax, and (2) a determination must be made as to whether the connection fee is appropriately and reasonably assessed. A distinction is drawn between the exercise of the police power and the proprietary functions of a municipality. In ***Loomis***, the City of Hailey derived its authority to charge connection fees from the Idaho Revenue Bond Act and its proprietary function. According to ***Loomis***, when charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act, the charges are not construed as taxes. However, if the charges are primarily for revenue raising purposes, they are essentially disguised taxes and must have legislative approval. The sewer and water connect fee in ***Loomis*** was not a tax because it was collected pursuant to the Idaho Revenue Bond Act and the fees were allocated and budgeted in conformity with the Act.

In the instant case, HLID collected the charges, *i.e.*, the "Tap-on Fees," in the exercise of a proprietary function and pursuant to the Irrigation District Domestic Water System Revenue Bond Act. As such, the charges did not constitute an impermissible tax.

The next step is to determine whether the charges were appropriately and reasonably assessed by HLID. Thus, even though the charges were not impermissible as a tax, they must still be appropriately and reasonably assessed.

---

legality of the procedures utilized by the city in charging connection fees as being in violation of the Idaho Revenue Bonding Act. In the instant case, no ordinance for the increase was passed by HLID; however, the By-laws provided for connection fee.

Viking claims that the connection fees are inequitable because they burden a member twice. According to Article 5 of the By-laws, it is HLID's responsibility to provide a connection to its water system for a member and it is the member's responsibility to pay for the costs to connect from the water meter to the residence. Article 8 of the By-laws requires a new domestic water user to pay a tap-on fee plus reimburse the district its parts and labor to connect to the system.

Viking asserts that the Tap-on Fee covers no actual cost involved in the physical application of water because the landowner or builder pays for parts and labor, such as meters and installation, and for the cost for transporting water from the point of delivery to the point of application. If the landowner or builder is thereafter charged for parts and labor and for transportation of water through the Tap-on Fee, the landowner or builder has been charged twice. Viking argues that, since all of the direct costs are paid by others, the Tap-on Fee is merely a revenue generating tax.

The facts reveal, however, that there is no double payment and that HLID is complying with its By-laws. Before 2003, developers installed their own meters and paid the costs for the meters directly. Since 2003, HLID installs the meters and collects that as part of the connection fee.[13]

Viking also argues that there is no rational relation between the amount of the Tap-on Fee and any reasonable or actual costs to HLID. ***See City of Chubbuck v. City of Pocatello***, 127 Idaho 198, 899 P.2d 411 (1995) (regulatory fee must be reasonably related to the cost of the underlying regulation and a tax requires an enabling statute). According to Viking, the Tap-on Fees are forced contributions upon select ratepayers to serve public needs at large. Viking claims that HLID expended $372,401.00 for additional fixed

[13] As noted elsewhere, a portion of the connection fee covers the actual cost of hooking into the system.

assets in 2004 and that almost half of that amount was paid for with the Tap-on Fees paid by Viking on the 65 homes immediately impacted by the increase in September of 2004. According to Viking, the connection fees may be used to acquire assets or for future expansion of the system.

HLID denies that the connection fee is for future expansion of the system. HLID also denies that half of the amount that Viking paid for Tap-on Fees was used to acquire assets.

Cathy Meyer, who is an independent Certified Public Accountant who audits HLID's books, was deposed in this case. She testified that the increase in HLID's assets in 2004 came through dedication of assets by developers pursuant to development agreements.[14] Therefore, the Tap-on Fees paid by Viking were not the source for any asset acquisition by HLID.

When new users connect to its system, HLID collects the payment. A portion of the payment covers the actual costs for parts and labor for connecting to the system. The remainder of the payment is set aside in a separate account with the state treasurer. That money is used to maintain the existing infrastructure. This would include replacement of existing water lines and costs associated with the installation of a replacement for a failing component of the existing water tower facility. These funds have not been used to subsidize daily operations or purchase additional system assets to provide additional capacity. Thus, the charges were appropriately assessed by HLID.

Viking complains about the method of determining the amount of the connection fee. Specifically, Viking argues that the change in the connection fee and the connection

[14] The connection fees paid by Viking were not used to acquire a new well or expand the system. Although a new well and other improvements were acquired, funds were obtained through development agreements with developers.

fee increase allowed for the collection of money without a vote by the members on a bond. However, in ***Loomis v. City of Hailey***, 119 Idaho 434, 807 P.2d 1272 (1991), the Idaho Supreme Court approved an "equity buy-in" connection fee and held that it was not necessary to have the connection fees or changes in connection fees approved by the voters.

The question then becomes whether the amount of the payments in this case was reasonable. Prior to the increase, Viking had not challenged the original payment rate of $2200. HLID acknowledges that the rates increased significantly when the payment was raised from $2200 to $2700 per house.

A connection fee will be approved if it is not unreasonably or arbitrarily imposed. The fee can be something more than the precise cost of the actual physical hookup. The legislature has not imposed exacting rate requirements; instead, "the law requires only that the fee be reasonably related to the benefit conveyed." ***Loomis v. City of Hailey,*** 119 Idaho at 442, 807 P.2d 1280. It is not up to the court to determine how an entity should allocate its fees and rates so long as they conform to statutory requirements and are reasonable. ***Id.*** Idaho's statutory scheme does not require a new user to "buy in" to the system nor does it prohibit such a "buy in" program. ***Loomis v. City of Hailey***, 119 Idaho at 443, 807 P.2d 1281.

In this case, the rate increase issue had been before the Board for some time. The $500 increase for a domestic connection represented: (a) the actual cost of the meter; and (b) an equity buy-in.

In arriving at the decision to increase the Tap-on Fee, the Board relied upon the report and recommendations of an advisory committee. The Board also reviewed the

water management plan and relied upon input from an engineer as to those parts of the water management plan that addressed obsolete or marginally functional areas, *i.e.*, that discussed the current state of the infrastructure and the engineer's projected future needs for replacements or repairs. The Board then weighed these factors in determining the amount needed for reserves and the amount for an "equity buy-in." The advisory committee and the Board looked at the value of comparable systems in the area and at the rates charged for equity buy-in at comparable systems in the area. The focus was upon taking care of the existing infrastructure and the maintenance that might be necessary.[15]

Viking claims that HLID should have engaged an accountant or an engineer to calculate the equity buy-in. However, even though a calculation was not provided by an accountant or engineer, the Board did not choose a number for the increase in a random manner. Instead, the Board reviewed and analyzed the issue, relying upon various figures and the needs of the system. The Board considered the current value of the existing system, the values and costs to purchase equity into comparable local water distribution systems, the water management plan of HLID with its infrastructure needs for maintenance, and the engineer's analysis regarding system repair and replacement.

Having reviewed the process, it cannot be found that the payment rate or the fee increase was arbitrary or unreasonable. Therefore, the Tap-on Fee of $2700 could be imposed by HLID.

In summary, the Tap-on Fee imposed by HLID on newly constructed homes does not constitute an impermissible tax. Furthermore, the payment amount of $2700 was not arbitrarily or unreasonably determined. On these issues, Viking's Motion for Summary Judgment must be denied.

[15] HLID denies that future growth was a part of the discussion regarding the fee increase.

III

VALIDITY OF THE BY-LAWS

Viking contends that, even if HLID had the statutory authority to establish connection fees, HLID cannot rely upon its By-laws. According to Viking, the By-laws are invalid because the members of the District did not authorize the changes or the increase in the connection charge.

The directors of an irrigation district have authority to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of land in the district. ***Idaho Code § 43-304.*** The only statutes requiring that members vote on a by-law are ***Idaho Code §§ 43-111 and 43-201***. However, both of those statutes pertain to directors of the irrigation district. They do not apply to the circumstances here.

Under ***Idaho Code § 42-2401***, a vote is required to change the by-laws of an irrigation or canal company, which are operating companies with shareholders. That statute does not apply to districts such as HLID.

A vote of all members does not have to take place each time a rate increase is imposed. Also, the By-laws do not have to be amended each time a rate increase occurs.

The By-laws must be equitable. ***Idaho Code § 43-304.*** In this case, the connection charge, as well as the increase, was equitable.

The HLID By-laws are valid. Therefore, Viking's Motion for Summary Judgment on the ground that the By-laws were invalid must be denied.

IV

CONSTITUTIONAL DUE PROCESS AND EQUAL PROTECTION RIGHTS

Viking complains that both its procedural and substantive due process rights, as well as its equal protection rights, have been violated. Viking contends that the Tap-on Fee was increased without notice and an opportunity to be heard. HLID did not adopt an ordinance so Viking claims that it was denied its substantive due process rights. Finally, Viking claims that HLID has violated its equal protection rights in that it has treated Tap-on Fees for various individuals or entities differently.

The Fourteenth Amendment to the United States Constitution provides, in part, as follows: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Notice and a hearing are required under the Fourteenth Amendment before such a deprivation of an individual's property takes place. ***Fuentes v. Shevin***, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

In this case, HLID provided notice of its meeting on September 7, 2004, by posting an agenda to its door. The notice stated "RATE INCREASE."

Viking has not identified any constitutionally protected right of which it was deprived. The setting of rates and fees does not deprive any member of the right to receive water from HLID.[16]

To the extent that Viking has alleged a deprivation of its Constitutional rights, its Motion for Summary Judgment must be denied.

---

[16] It might have been preferable for HLID to enact an ordinance, even though it was not required. It might also have been preferable for HLID to establish a date in the future rather than immediately for the increase in the Tap-on Fee to become effective. Either or both of these might have avoided at least some of the issues presented in this case.

V

CONTRACTS WITH THE BUREAU OF RECLAMATION

HLID entered into contracts with the United States Bureau of Reclamation many years ago with regard to water under its jurisdiction. The last contract with the Bureau was entered into in 1977. The wells, which are now the sole sources of water to HLID, were put in place in the 1980s when it was determined that Hayden Lake was no longer a viable source for domestic water. Thus, the Bureau does not own the main source of domestic water, which was not addressed in the contracts, or the infrastructure. Therefore, while some portions of HLID's system might be encumbered by the contracts, significant portions are not. Nonetheless, the Bureau contracts allow for reserves. The limitations in the contracts relate to irrigation waters, which are separate from the connection fees for the domestic water system.

The contracts with the Bureau of Reclamation do not impact the Tap-on Fee or its increase for domestic water users. Viking's Motion for Summary Judgment based on this issue is denied.

VI

CONCLUSION AND ORDER

Based on the foregoing, it is hereby ORDERED that the Motion for Summary Judgment by Plaintiff, Viking Construction, Inc., shall be and hereby is denied as set forth herein.

DATED this 14th day of January, 2009.

John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER IN RE: MOTION FOR SUMMARY JUDGMENT was mailed by U.S. postal service, postage prepaid, sent by facsimile transmission, or sent by interoffice mail, on the 14 day of January, 2009, to the following:

SCOTT ROSE
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702
FAX: 208-342-3669

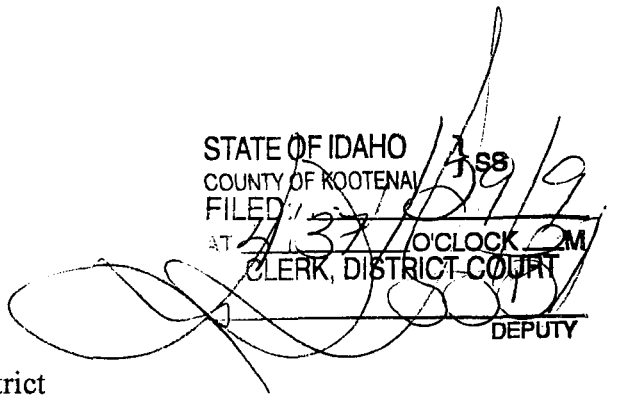
Susan P. Weeks
JAMES, VERNON & WEEKS, P.A.
1626 Lincoln Way
Coeur d'Alene, Idaho 83814
FAX: 208-664-1684

ALL FIRST DISTRICT COURT JUDGES

DANIEL J. ENGLISH
Clerk of the Court

By: Deputy Clerk

SUSAN P. WEEKS
JAMES, VERNON & WEEKS, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
Facsimile: (208) 664-1684
ISB #4255



Attorneys for Defendant Hayden Lake Irrigation District

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation, Plaintiff, vs. Hayden Lake Irrigation District an Idaho quasi-municipal corporation. Defendant.	Case No. CV-04-8889 **SUMMARY JUDGMENT**

Plaintiff, Viking Construction, Inc.'s motion for summary judgment came on for hearing before the undersigned on October 22, 2008. The Court having heard the argument of counsel, being fully advised in the premises, and having issued its Memorandum Opinion and Order in Re: Motion for Summary Judgment;

NOW THEREFORE, IT IS HEREBY ORDERED that Plaintiff, Viking Construction, Inc.'s motion for summary judgment is denied.

BE IT FURTHER ORDERED that Plaintiff's case is dismissed with prejudice as no issues remain to be resolved.

DATED this 28th day of January, 2009

JOHN P. LUSTER
District Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of January, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐ U.S. Mail ☐ Overnight Mail

☐ Hand Delivered ☒ Telecopy (FAX)

SCOTT ROSE, ESQ.
300 Main Street, Ste. 153
Boise, ID 83702
Fax: (208) 345-1836

SUSAN P. WEEKS
JAMES, VERNON & WEEKS, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814
Fax: (208) 664-1684

faxed 03/4/09 to attorney Rose
208-342-3829

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED 857534 535 536
2009 MAR -4 PM 2:06
CLERK DISTRICT COURT
DEPUTY

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702

(208) 342-2552 Telephone
(208) 342-3669 Fax
scott@idahoiplaw.com

Plaintiffs' Attorney

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation Plaintiff, vs. Hayden Lake Irrigation District, an Idaho Quasi-Municipal Corporation Defendant.	Case No.: CV 04-8889 NOTICE OF APPEAL Pre-paid Filing Fee Confirmation No. 057296 Fax No.: (208) 342-3669

NOTICE IS HEREBY GIVEN THAT Plaintiff, Viking Construction, Inc., an Idaho Corporation by and through his attorney of record, Scott Rose, appeals against the above-named Defendant, Hayden Lake Irrigation District an Idaho Quasi-municipal Corporation to the Idaho Supreme Court from Summary Judgment, entered in the above entitled proceeding of the First Judicial District, by the Honorable District Court Judge, John P. Luster, on the 29th day of January 2009, as follows:

(a) Title. The title of the action or proceeding is:

Viking Construction, Inc. v. Hayden Lake Irrigation District;

(b) Court or Agency Title. The title of the court or agency which heard the trial or proceeding and the name and title of the presiding judge or official is:

The District Court of the First Judicial District, the Honorable District Court Judge, John P. Luster presiding;

(c) Case Number. The number assigned to the action or proceeding by the trial court or administrative agency is:

CV 04-8889;

(d) Parties. The name of the appealing party and the party's attorney and the name of the adverse party and that party's attorney are:

Appealing Party:	Viking Construction, Inc.
	Scott Rose, Plaintiff's Attorney
Adverse Party:	Hayden Lake Irrigation District
	Susan P. Weeks, Defendant's Attorney;

(e) Designation of Appeal.

Designation of the Judgment, Order or Decree Appealed from is:

Summary Judgment entered on the 29th day of January, 2009, (the Memorandum Opinion and Order in Re: Motion for Summary Judgment was entered on January 14, 2009);

(f) Issues. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal are:

1. Whether the District Court properly construed Chapter 19 of Title 43 of the Idaho

Code (the "Irrigation District Domestic Water System Act"), and more particularly whether Chapter 19 of Title 43 of the Idaho Code should have been construed in pari materia;

2. Whether the Hayden Lake Irrigation District Bylaws were proper, and more particularly:

(A) whether Title 42 Idaho Code applies to irrigation districts;

(B) whether the general powers of an irrigation district's board to establish equitable by-laws pursuant to I..C. Section 43-304 empowers the board to amend its Bylaws unilaterally and/or without notice;

(C) whether the District's Bylaws as adopted are equitable within I..C. Section 43-304; and

(D) whether the power of an irrigation district to impose a fee can be derived from its bylaws;

3. Whether the District Court's conclusions are supported by the facts in the record;

4. Whether the fees imposed violate federal law, and breach the contracts entered into between the United States and the Hayden Lake Irrigation District;

5. Whether the fees imposed are an unlawful tax;

6. Whether Section 2 of Article XII of the Idaho Constitution applies to irrigation districts;

7. Whether the Hayden Lake Irrigation District's imposition of a fee violated Viking Construction, Inc.'s constitutional rights under Section 6 of Article VII of the Idaho Constitution;

8. Whether the Hayden Lake Irrigation District's imposition of a fee violated Viking Construction, Inc.'s constitutional rights under Sections 5 and 2 of Article VII of the Idaho

Constitution;

9. Whether the Hayden Lake Irrigation District's imposition of a fee violated Viking Construction, Inc.'s constitutional rights under Sections 2, 4, and 5 of Article XV of the Idaho Constitution;

10. Whether the fee imposed by the Hayden Lake Irrigation District was permissible;

11. Whether the fee increase imposed by the Hayden Lake Irrigation District was permissible;

12. Whether the District Court properly construed the *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) "equitable buy-in" theory; and

13. Whether the Hayden Lake Irrigation District's imposition of the fee violated Viking Construction, Inc.'s due process and equal protection rights;

(g) Jurisdictional Statement. Plaintiff has the right to appeal to the Idaho Supreme Court from the District Court orders as appealable orders pursuant to Rule 11(a)(1);

(h) Transcript. A standard transcript is requested;

(i) Record. The complete record in this case is desired, including but not limited to, the Motion for Summary Judgment, Affidavit of Scott Rose in Support of Summary Judgment and Exhibits "A", "B", "C", "D", and "E" thereto, Plaintiff's Opening Brief in Support of Motion for Summary Judgment, Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgment, the Transcript of the Summary Judgment Hearing, and the Transcripts of the depositions of Bert Rohrbach Vol. I and II, and Cathy Meyer;

(j) Sealed Record. An order has not been entered sealing all or any part of the record or transcript;

(k) Certification. I, Scott Rose, Claimant's Attorney, certify, as follows:

1. That service of the notice of appeal has been made upon Judge Luster's reporter of the proceeding, namely Anne McManus, by fax, as follows: (208) 446-1188;

2. That the clerk of the District Court fee in the amount of $115.00 fee and the Supreme Court fee in the amount of $86 are paid by credit card, and a check executed to the Supreme Court for $86 will be sent by separate cover;

3. That the estimated fees for preparation of the clerk's or agency's record have been paid;

4. That all appellate filing fees have been paid; and

5. That service has not been made on the Attorney General with the belief that this matter is not referred to in Section 67-1401(1), Idaho Code, so service has not been made upon the attorney general of the state of Idaho.

DATED this 4 day of March, 2009.

Scott Rose

By: _____
Plaintiff's Attorney, ISB# 4197

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 4 day of March, 2009, a true and correct copy of the foregoing Notice of Appeal was mailed by regular U.S. mail to Susan Patricia Weeks addressed, as follows:

Susan Patricia Weeks
Attorney at Law
Owens, James, Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814

_____

Scott Rose
Attorney at Law
300 Main Street, Suite 153
Boise, Idaho 83702

(208) 342-2552 Telephone
(208) 342-3669 Fax
scott@idahoiplaw.com

Plaintiffs' Attorney

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 3/17/09
O'CLOCK P M
DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Viking Construction, Inc., an Idaho Corporation Plaintiff, vs. Hayden Lake Irrigation District, an Idaho Quasi-Municipal Corporation Defendant.	Docket No.: 36231-2009 AMENDED NOTICE OF APPEAL Kootenai County Case No.: CV 04-8889 Pre-paid Filing Fee Confirmation No. 057296 Fax No.: (208) 342-3669

NOTICE IS HEREBY GIVEN THAT Plaintiff, Viking Construction, Inc., an Idaho Corporation by and through his attorney of record, Scott Rose, appeals against the above-named Defendant, Hayden Lake Irrigation District an Idaho Quasi-municipal Corporation to the Idaho Supreme Court from Summary Judgment, entered in the above entitled proceeding of the First Judicial District, by the Honorable District Court Judge, John P. Luster, on the 29th day of January 2009, as follows:

(a) Title. The title of the action or proceeding is:

Viking Construction, Inc. v. Hayden Lake Irrigation District;

(b) Court or Agency Title. The title of the court or agency which heard the trial or proceeding and the name and title of the presiding judge or official is:

The District Court of the First Judicial District, the Honorable District Court Judge, John P. Luster presiding;

(c) Case Number. The number assigned to the action or proceeding by the trial court or administrative agency is:

CV 04-8889;

(d) Parties. The name of the appealing party and the party's attorney and the name of the adverse party and that party's attorney are:

Appealing Party:	Viking Construction, Inc. Scott Rose, Plaintiff's Attorney;
Adverse Party:	Hayden Lake Irrigation District Susan P. Weeks, Defendant's Attorney;

(e) Designation of Appeal.

Designation of the Judgment, Order or Decree Appealed from is:

Summary Judgment entered on the 29th day of January, 2009, (the Memorandum Opinion and Order in Re: Motion for Summary Judgment was entered on January 14, 2009);

(f) Issues. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal are:

1. Whether the District Court properly construed Chapter 19 of Title 43 of the Idaho Code (the "Irrigation District Domestic Water System Act"), and more particularly whether

Chapter 19 of Title 43 of the Idaho Code should have been construed in pari materia;

2. Whether the Hayden Lake Irrigation District Bylaws were proper, and more particularly:

(A) whether Title 42 Idaho Code applies to irrigation districts;

(B) whether the general powers of an irrigation district's board to establish equitable by-laws pursuant to I..C. Section 43-304 empowers the board to amend its Bylaws unilaterally and/or without notice;

(C) whether the District's Bylaws as adopted are equitable within I..C. Section 43-304; and

(D) whether the power of an irrigation district to impose a fee can be derived from its bylaws;

3. Whether the District Court's conclusions are supported by the facts in the record;

4. Whether the fees imposed violate federal law, and breach the contracts entered into between the United States and the Hayden Lake Irrigation District;

5. Whether the fees imposed are an unlawful tax;

6. Whether Section 2 of Article XII of the Idaho Constitution applies to irrigation districts;

7. Whether the Hayden Lake Irrigation District's imposition of a fee violated Viking Construction, Inc.'s constitutional rights under Section 6 of Article VII of the Idaho Constitution;

8. Whether the Hayden Lake Irrigation District's imposition of a fee violated Viking Construction, Inc.'s constitutional rights under Sections 5 and 2 of Article VII of the Idaho Constitution;

9. Whether the Hayden Lake Irrigation District's imposition of a fee violated Viking Construction, Inc.'s constitutional rights under Sections 2, 4, and 5 of Article XV of the Idaho Constitution;

10. Whether the fee imposed by the Hayden Lake Irrigation District was permissible;

11. Whether the fee increase imposed by the Hayden Lake Irrigation District was permissible;

12. Whether the District Court properly construed the *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) "equitable buy-in" theory; and

13. Whether the Hayden Lake Irrigation District's imposition of the fee violated Viking Construction, Inc.'s due process and equal protection rights;

(g) Jurisdictional Statement. Plaintiff has the right to appeal to the Idaho Supreme Court from the District Court orders as appealable orders pursuant to Rule 11(a)(1);

(h) Transcript. A transcript is requested, as follows: the Transcript of the Summary Judgment Hearing dated October 22, 2008; and That service of this Amended Notice of Appeal has been made upon Judge Luster's reporter of the proceeding, namely Anne McManus, by fax, as follows: (208) 446-1188.

(i) Record. The complete record in this case is desired, including but not limited to, the Motion for Summary Judgment, Affidavit of Scott Rose in Support of Summary Judgment and Exhibits "A", "B", "C", "D", and "E" thereto, Plaintiff's Opening Brief in Support of Motion for Summary Judgment, Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgment, the Transcript of the Summary Judgment Hearing, and the Transcripts of the depositions of Bert Rohrbach Vol. I and II, and Cathy Meyer;

(j) Sealed Record. An order has not been entered sealing all or any part of the record or transcript;

(k) Certification. I, Scott Rose, Claimant's Attorney, certify, as follows:

1. That service of the notice of appeal has been made upon Judge Luster's reporter of the proceeding, namely Anne McManus, by fax, as follows: (208) 446-1188;

2. That the clerk of the District Court fee in the amount of $115.00 fee and the Supreme Court fee in the amount of $86 are paid by credit card, and a check executed to the Supreme Court for $86 will be sent by separate cover;

3. That the estimated fees for preparation of the clerk's or agency's record have been paid;

4. That all appellate filing fees have been paid; and

5. That service has not been made on the Attorney General with the belief that this matter is not referred to in Section 67-1401(1), Idaho Code, so service has not been made upon the attorney general of the state of Idaho.

DATED this 17 day of March, 2009.

Scott Rose

By: _____
Plaintiff's Attorney, ISB# 4197

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17 day of March, 2009, a true and correct copy of the foregoing Notice of Appeal was mailed by regular U.S. mail to Susan Patricia Weeks addressed, as follows:

Susan Patricia Weeks
Attorney at Law

Owens, James, Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VIKING CONSTRUCTION, INC., an Idaho Corporation **Plaintiff/Appellant,** **vs** **HAYDEN LAKE IRRIGATION DISTRICT an Idaho quasi-municipal corporation** **Defendants/Respondents.**	**SUPREME COURT NO. 36231** **CIVIL CASE NO.** **CV04-8899**

CLERK'S CERTIFICATE OF EXHIBITS

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court of Appeals.

I further certify that the following documents will be submitted as exhibits to the Record:

Exhibit A – Client Inquiry Disbursement

Exhibit B - Billing

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 17th day of April, 2009.

Daniel J. English
Clerk of the District Court

Debra D. Leu
Deputy Clerk

165

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VIKING CONSTRUCTION, INC., an Idaho Corporation **Plaintiff/Appellant,** **vs** **HAYDEN LAKE IRRIGATION DISTRICT an Idaho quasi-municipal corporation** **Defendants/Respondents.**	**SUPREME COURT NO. 36231**

CLERK'S CERTIFICATE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellants and Respondents were notified that the Clerk's Record and Reporter's Transcript were complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid, on the 17th day of April, 2009.

I do further certify that the Clerk's Record and Reporter's Transcript will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 17th day of April, 2009.

DANIEL J. ENGLISH

Clerk of District Court

By: Debra D. Leu
Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

VIKING CONSTRUCTION, INC., an Idaho Corporation	)	
Plaintiff/Appellant,	)	**SUPREME COURT NO. 36231**
vs	)	
HAYDEN LAKE IRRIGATION DISTRICT an Idaho quasi-municipal corporation	)	
Defendants/Respondents.	)	

CLERK'S CERTIFICATE OF SERVICE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of Record in this cause as follows:

Attorney for Appellant

SCOTT ROSE
300 W Main St., Ste 153
Boise, ID 83702

Attorneys for Respondents

SUSAN P. WEEKS
1626 Lincoln Way
Coeur d'Alene, ID 83814

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 17th day of April, 2009.

DANIEL J. ENGLISH
Clerk of the District Court

By: Debra D. Lei
Deputy Clerk